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**Ben Clapperton**

*Ancient Greek Law in a Near Eastern Context: Comparative Case Studies of Homicide Pollution and Adultery Law in Greece and the Near East*

Abstract:

This thesis comprises two case studies which each examine a point of Greek law in the context of the Near East. Significant work has been done in recognising that the Greeks were in a network of exchange with the Near East; but whilst progress has been made in areas such as literature, less work has been done in legal history. In part, this is because a similarity found in a law cannot point to influence in the way it can in other fields. A difference in constitutional law has also erected a barrier. In the case of private law, however, the issues facing the Greeks were the same as the ones facing their neighbours. The first case study focuses on Athenian homicide pollution; which has been influenced by studies such as that of Robert Parker who believed it to be a relic of an earlier period that had no place in Classical Athens. A comparative study with similar beliefs in the Hebrew Bible instead demonstrates that in each society it represented the concerns of the community, who could not otherwise be involved in what was legally a private offence. The second focuses on adultery law. The Greeks differed from their neighbours in subsuming adultery into the broader offence of *moicheia*, and a comparative study with Near Eastern adultery law demonstrates that this created an important difference in how it was punished. In the Near East, adultery was an offence committed by the wife and her lover against the husband, who was required to mete out an equal level of punishment to each. In Athens and Gortyn, the offence was by the *moichos*, and no punishment was imposed on the woman. Collectively, these case studies help to demonstrate the value of studying Greek legal history in a wider regional context.

# *ANCIENT GREEK LAW IN A NEAR EASTERN CONTEXT*

Comparative Case Studies of Homicide Pollution and  
Adultery Law in Greece and the Near East.

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2018*

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## Introduction

The overarching aim of this study is to help bring the discipline of Greek legal history into an increasing climate of openness in modern scholarship to studying Greek civilisation as both influenced by and in a network of exchange with the civilisations of the Near East. Fields such as art, literature, and philosophy have led the way in these kinds of studies, and in presenting parallels between Near Eastern and Greek works they have helped to demonstrate that the Greeks did not exist in isolation but were influenced by their neighbours. The focus of this study is, however, a purely comparative one, which is primarily because common legislation against offences such as adultery or



homicide by the Greeks and their neighbours is much less likely to demonstrate influence than a similarity in literary motifs.

Instead of seeking influence, a comparison between the respective sets of legislation and legal documents can highlight similarities and differences which form the basis for exploring issues in Greek legal history from a different perspective. Examining these similarities and differences can provide insights which would go unnoticed in studies focused solely upon the Greeks, whether by adding additional context to a debate on a point of Greek law or bringing to light questions that would never otherwise have been asked if the differences between the Greeks and their neighbours were not examined.

As may be obvious from the preceding discussion, whilst what follows is a comparison of Greek and Near Eastern legal history, the focus here is on what this comparison can tell us about Greek legal history, rather than what it can tell us about Near Eastern legal history. This should not be taken to mean that the study assumes the comparison can only be useful in one direction, but rather that it is simply the scope of this particular study.

The method chosen for this comparison is the case study, which allows for specific areas of law to be examined in detail. The scope of this study allows for two case studies to be carried out. The first compares Classical Athenian homicide pollution with that found in the Hebrew Bible, whilst the second case study compares Near Eastern adultery law with Greek *moicheia* law. Between them, they demonstrate both the

value of introducing additional context to a debate within Greek legal scholarship and the ability of a comparative study to spotlight issues which would not otherwise have been considered without it.

### Scholarship on Greece and the Near East

The influence of ‘the Near East’ upon the development of Greek culture and civilisation is not a new topic for modern scholarship, though it is one which has only recently gained wide acceptance. The Hellespont, a stretch of water sufficiently narrow that Xerxes was able to build a pontoon bridge across it, provided both the Greeks of the Classical period and modern scholarship with a conceptual boundary; one that separated the Persians, Asia, and the East on one side of it, from the Greeks, Europe, and the West on the other side.<sup>1</sup> This conceptual divide has helped to create the homogenous area of the Near East in modern scholarship.<sup>2</sup> Civilisations such as those of the Sumerians, Hittites, Egyptians, Assyrians, and Persians have fallen under the umbrella of ‘Near East’, and are studied as if they were a collective and coherent unit, even though some of these civilisations

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<sup>1</sup> See Hauser (2001), 93-94; Wiesehöfer (2009), 162-163.

<sup>2</sup> The term itself is not a creation of modern scholarship, but rather emerged during the nineteenth century to define an area vaguely covered by the Ottoman Empire. Its use in modern scholarship is not entirely consistent either, with a geo-political usage that varies by era. Westbrook includes Egypt and the Hittites in his edited volume on Near Eastern law; a work that whilst it touches on the Hellenistic period, is primarily concerned with a chronological span covering the earliest Mesopotamian civilisations down to the start of the Classical period; Westbrook (2003b, 2003c). Conversely, Millar excludes both Egypt and much of Western Turkey from his work on the Roman Near East, regions which by the death of Augustus had been successively Hellenised and then fallen under direct Roman control; Millar (1993).

were chronologically and geographically closer to the Greeks than they were to each other.

The roots of this dichotomy in modern scholarship between the Greeks and the Near East date back to the Enlightenment. The eighteenth century was a period in which a new humanism emerged in Germany focused on the study of Greek art and literature, as opposed to the previous Latin-focused study of the ancient world.<sup>3</sup> The study of Classics subsequently emerged in this context as a distinct discipline within academia, with Greek culture as its fountainhead.<sup>4</sup> At the time, much of Near Eastern history had been lost to European scholarship; with the Hebrew Bible representing a rare example of a surviving collection of Near Eastern texts. Along with the discovery of Indo-European as the ancestor of most European languages, separate and distinct from the Semitic languages of the Near East, and the contemporary Romantic view that culture and literature were intimately connected to the civilisations that produced them, these three trends were presented by Burkert as foundational in the separation of Greek culture from its eastern neighbours in modern scholarship.<sup>5</sup> The

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<sup>3</sup> At the head of this movement was Johann Joachim Winckelmann, who was at the forefront of a renewal of Classical scholarship in Germany in the eighteenth century, and who placed a high value upon the emulation of earlier masterpieces. In this way, Roman culture, the focus of earlier European humanism, came increasingly to be seen as an approach to the Greek culture which it emulated. See Pfeiffer (1976), 167-170.

<sup>4</sup> Friedrich Wolf famously recorded his name as 'studiosus philologiae' in his 1777 matriculation, later claiming to have invented the discipline of philology, although he may not have been the first person to identify himself as such; Schröder (1913) 168-171. Wolf concentrated on the study of Homer and Plato, but not the New Testament, helping to create a break with Theology in the creation of Classics as a discipline; Pfeiffer (1976), 173.

<sup>5</sup> Burkert went on to identify the decipherment of Egyptian hieroglyphics and Mesopotamian cuneiform which opened up the history of the Near East and

Greeks of the Archaic period were seen as pioneers in fields such as art, literature, philosophy, architecture, and politics; and for much of the next century, the view of a “pure, self-contained Hellenism” appearing for the first time in the works of Homer held sway.<sup>6</sup> The Greeks of the Classical period further helped to contribute to the view that they were both separate from and superior to their neighbours with their stereotype of the eastern barbarian, constructed in the aftermath of the Persian Wars in works such as Aeschylus’ *Persians*.<sup>7</sup>

Early inroads into the East/West dichotomy were made in the field of art. Discoveries of imported Near Eastern artwork in Greece, and the recognition that Greek art in the Archaic period had been influenced by techniques and characteristics of Near Eastern art, provided definite proof that Greece was in a network of both material and cultural exchange with the Near East.<sup>8</sup> In the post-war period it would be primarily through literary comparisons that the influence of Near Eastern culture on Greek culture would begin to gain acceptance. The Hittite text of the *[Song] of Kumarbi* was published in 1946 and its tale

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demonstrated its greater antiquity, the discovery of the Mycenaean civilisation and the decipherment of Linear B to demonstrate a prehistory for the Archaic Greeks, and the decipherment of Hittite which demonstrated an Indo-European language spoken by a Near Eastern culture, as laying the groundwork in the nineteenth century for the gradual erosion of the separation between the Greeks and the Near East; Burkert (1992), 1-4. See also Bernal (1987), 224-227.

<sup>6</sup> Averintsev (1999), 1; Burkert (1992), 3; West (1969), 113.

<sup>7</sup> See Hall (1989) and Harrison (2001). See also Plato *Epin.* 987d-e for a Classical Athenian view of the superiority of the Greeks over their eastern neighbours.

<sup>8</sup> Frederik Poulsen published a general survey of Near Eastern influence on Greek art in 1912, and by 1966, Akurgal could speak of the work of several generations of scholars when publishing his own survey on the influence of the Near East in the areas of art, literature, and fashion; Poulsen (1912); Akurgal (1966). See also Dunbabin (1957) for another survey on Near Eastern influence on Greek art; and Burkert (1992), 4; Crielaard (1995), 215.

of generational strife amongst the gods and the castration of Anu by Kumarbi bears a striking resemblance to Hesiod's *Theogony* and its story of the castration of Ouranos by Kronos.<sup>9</sup> *Kumarbi* pre-dates *Theogony* by around five hundred years, and is likely based upon an even older Hurrian version, which meant that if the striking similarities between them were evidence of influence, then it must have been the Greek text which was influenced by the Near Eastern.<sup>10</sup>

Twenty years later, in his commentary on the *Theogony*, Martin West made the claim that "Greece is part of Asia. Greek literature is a Near Eastern literature".<sup>11</sup> Despite the obvious parallels which were emerging between Greek and Near Eastern literature, the claim was still a controversial one, and did little to change the traditional view of Archaic Greek civilisation.<sup>12</sup> In 1993, Knox reiterated the traditional view that the Greeks invented fields such as philosophy, political theory, many of the sciences, and the concept of a national literature.<sup>13</sup> Knox emphasised what he felt to be Greek literature's originality as well as its superiority to its predecessors.<sup>14</sup> If the Greeks could no longer be seen as having invented every aspect of their civilisation, then

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<sup>9</sup> *Theog.* 154-182. See West (1997), 278-280 for a summary of the [*Song*] of *Kumarbi*.

<sup>10</sup> West (1997), 103,

<sup>11</sup> West (1966), 31. In addition to literature, West also argued that Greek philosophy had been heavily influenced by the Near East, especially in the period between 550-480 during which time West claimed that displaced Magi were the source of this transmission; West (1971).

<sup>12</sup> "...a remarkable claim when everyone knew that Greece is part of Europe and its literature unlike anything that appeared in the Near East"; Powell (2000), 662.

<sup>13</sup> Knox (1993).

<sup>14</sup> Knox (1993), 31. See also Bernal (1987), 225; "the predominant view has been maintained that although the Egyptians were technically proficient they were not 'truly civilised'."

any precursors to them could be dismissed as deeply inferior.<sup>15</sup> Three years later, Osborne minimised any sense of cultural contact between Archaic Greece and the Near East.<sup>16</sup> Osborne not only dismissed any Near Eastern influence on the works of Hesiod by ascribing the similarities to the traditional nature of the poetry, but he also denied that there was any cultural influence at all between the Greeks and the Near East during the eighth century.<sup>17</sup> In place of influence, Osborne restricted cultural contacts between Archaic Greece and the Near East to small portable trade items such as jewellery, and a fad for exotic Oriental motifs in Greek art.<sup>18</sup> However, the tide was beginning to turn, and two books published either side of Knox and Osborne, Burkert's *The Orientalizing Revolution*, and West's *The East Face of the Helicon*, took decisive steps forward in establishing the Archaic Greeks as part of a network of cultural exchange with their neighbours.<sup>19</sup> Burkert demonstrated that Near Eastern influence on the Greeks went beyond the reception of simple goods to encompass areas such as myth and religion. West's book presented an avalanche of parallels between Greek and Near Eastern literature, not all of them convincing, but more than sufficient to make his case.

Challenges to traditional scholarly views on the Near East and its relationship with the ancient Greeks also came from two authors

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<sup>15</sup> A similar claim for mathematics is made by Todd; Todd (1993), 3.

<sup>16</sup> Osborne (1996).

<sup>17</sup> Osborne (1996), 142.

<sup>18</sup> Osborne (1996), 41, 167-168.

<sup>19</sup> Burkert (1992); West (1997). *The Orientalizing Revolution* was translated from Burkert's *Die orientalisierende Epoche in griechischen Religion und Literatur*; Burkert (1984). See Moyer (2006), for criticism of Burkert.

outside the field of Classics, each of which generated considerable discussion within the discipline. Edward Said's *Orientalism* attacked what he saw as the construction of an 'Orient' by Western scholarship.<sup>20</sup> As a coherent cultural, geographic, and ethnic whole, Said claimed that the Orient existed only as a construct of the western discourse, one which was reduced to a few stereotypes that formed its underlying assumptions. He argued that Orientalism was a political doctrine that was enforced upon the Orient by the West due to its relative weakness, and that the things that made the Orient different from the West were then equated in the Western outlook with Oriental weakness.<sup>21</sup> Similarly to Burkert, albeit for slightly different reasons which stem from a colonial rather than a strictly academic starting point, Said also identified the late eighteenth century as the fountainhead for modern Orientalism. Whilst the scope of the Orient covered a large area, Said argued that the area of the Near East, and the shared dominance of it by Britain and France in the nineteenth century, was the primary source of modern Orientalism; one that helped to create a shared European intellectual power over the area, that in turn informed the understanding of it and the people who lived there.<sup>22</sup>

In *Black Athena*, Martin Bernal argued that concerns over the threat posed by ancient Egypt to the primacy of Greek culture and of Christianity, coupled with emerging ideas on race, caused Western scholarship from the end of the eighteenth century onwards to overturn

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<sup>20</sup> Said (1989).

<sup>21</sup> Said (1989), 204.

<sup>22</sup> Said (1989), 40-42.

what he claimed was until then a widely accepted view of significant Egyptian and Phoenician influence on the development of Greek culture in the second millennium; a view that Bernal claimed dated all the way back to the Greeks themselves.<sup>23</sup> Bernal argued that black slavery caused European thinkers to keep black Africans as far away from the roots of European civilisation as possible, whilst rising anti-Semitism accounted for the Phoenicians. In their place, an Aryan race of northern conquerors came to be seen as the progenitors of Greek culture.<sup>24</sup> Both *Orientalism* and particularly *Black Athena* have faced criticism. Said for the polemical nature of his work, his lack of rigour, a focus on the discourse about the region but not the region itself, and a selective use of evidence.<sup>25</sup> Bernal has come under significant criticism for his methodology and few of his claims have gained acceptance, but between them, Said and Bernal contributed to the climate fostered by the likes of Burkert and West and helped Classicists to question the ideologies which underpinned their work.<sup>26</sup>

In this atmosphere of ideological awareness, and with the evidence that the likes of Burkert and West had brought to bear, Haubold was

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<sup>23</sup> Bernal (1987, 1991, 2001).

<sup>24</sup> Bernal (1987).

<sup>25</sup> For examples, see Behdad (1994); Halliday (1996), 200-201; Majeed (1992), 4; Makiya (1993), 317-318; Sardar (1999), 76; Varisco (2007), 270-273.

<sup>26</sup> "Response to Martin Bernal's *Black Athena* volumes has generated an overwhelming bibliography. Most authors have written about a particular argument canvassed in the volumes and why they agree or, as in most cases, disagree", Lederman (2000). "One can disagree with specific points in Bernal's book, but the obligation to educate oneself about the political and social history of classicism cannot be ignored."; Morris (1989), 51.

For criticism of *Black Athena* see Lefkowitz and MacLean Rogers (1996); Lefkowitz (1996); Kristeller (1995), 125-127.



prepared to call the debate on influence over in 2002.<sup>27</sup> Recent scholarship of the Archaic period has come to recognise that Near Eastern cultural influence was both real and widespread, and it is now in the early stages of a major reassessment of the period.<sup>28</sup> However, despite the new openness to the study of Near Eastern influence on the Greeks of the Archaic period, comparatively little work has been carried out on Greek legal development.<sup>29</sup> Studies focusing on the direct transmission of Near Eastern laws to the Greeks date as far back as Mühl in 1933, though his claim that Near Eastern influence can be detected in a wide number of Greek laws based upon their similarities found little acceptance.<sup>30</sup> Subsequent to Mühl there have been more narrowly focused studies, such as that of Pounder who claimed that some Cretan inscriptions are influenced by apotropaic curses from the Near East, and a recent collection of essays examined the interplay of law and religion in the societies of the eastern Mediterranean.<sup>31</sup> As

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<sup>27</sup> "Most Homerists would probably now agree with Burkert that the issue of Near Eastern connections can no longer be ignored."; Haubold (2002), 2.

<sup>28</sup> "Near Eastern influence cannot be put down as a marginal phenomenon to be invoked occasionally in explanations of isolated peculiarities. It was pervasive at many levels and at most times."; West (1997), 59. "...the older cultures of the Ancient Near East had a profound impact on the formative period of Greek civilisation (which has) opened up new approaches that were barely acknowledged a generation ago; Shapiro (2007), 4. See Burkert (2004); Dougherty (2001); Haubold (2002), 1-19; Loudon (2010); and Lopez-Ruiz (2010); for a selection of recent works which focus upon the relationship between Archaic Greece and the Near East. There is still a little way to go, however. Roisman's recent "inclusive and integrated" history of ancient Greece gives a token two-paragraph adjunct to its chapter on Hesiodic society, which does little more than note that there was a Near Eastern influence on the Greeks at this time; Roisman (2011), 45-47.

<sup>29</sup> Naiden (2013), 80. Shapiro's recent edited volume on Archaic Greece, one which acknowledges Near Eastern influence and takes it as a starting point for a reassessment of the period, does not include a chapter on legal history; Shapiro (2007).

<sup>30</sup> Mühl (1933); Gagarin (1989), 128.

<sup>31</sup> Pounder (1984), 243-250; Hagedorn and Kratz (2013).

written law codes in the Near East pre-date written laws in Archaic Greece, it has been argued that the Greeks picked up the practice of writing laws from the east.<sup>32</sup> Gagarin has observed that even if this were true, it would tell us little about the development of written laws in Greece.<sup>33</sup> Though he intends to disprove Near Eastern influence on Greek written laws, Gagarin's observation touches upon an important point missing from studies such as Mühl's, which is that proof of influence should not be an end in itself, but the starting point for gaining greater understanding of the legal history of Greece and the Near East.

#### Archaic Greek and Near Eastern Law

In his introduction to a major edited volume on the legal history of the Near East, Raymond Westbrook defined what he saw as the common features of Near Eastern law.<sup>34</sup> Though he did not discuss them in the context of Greek law, he spelled out what is often seen as a demarcation point between the two when he discussed the role of autocratic rulers.<sup>35</sup> The view of Near Eastern judicial development holds that the civilisations of the Near East were ruled by kings. These kings were believed to be, or at least presented as, appointed to their position by the gods, which provided them with a divine mandate to rule, and their

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<sup>32</sup> Boardman (1970), 23; Jeffery (1976), 189. For an opposing viewpoint, see Gagarin (1989), 126-129.

<sup>33</sup> Gagarin (1989), 129.

<sup>34</sup> Westbrook (2003b), 1-92.

<sup>35</sup> Harris (2006), 6-9; Westbrook (2003b), 25-27.

office tended to be hereditary.<sup>36</sup> The most important aspect of this divine mandate was the imperative placed upon the king to ensure that there was justice in the land, and especially for the vulnerable members of his society.<sup>37</sup> Due to their divine mandate they were not strictly speaking autocratic rulers, they could in theory be removed by the gods if they did not rule well, but the king was not answerable to any mundane judicial institutions and had full legislative powers.<sup>38</sup>

By contrast, the Greeks are often seen as having developed the notion of the rule of law.<sup>39</sup> No-one in the *polis* was above the law, no matter how powerful they were, and all were held accountable to it. Although some *poleis*, such as Sparta, did have hereditary monarchs, they did not have full legislative powers and were subject to the law in the same way as any other citizen of the *polis*. Even during the period of Homeric kings, Gagarin sees the Greek legal process as being open and non-authoritarian, with a place always reserved for public participation in Archaic Greece.<sup>40</sup> Sealey made explicit the perceived difference between the Greeks and their eastern neighbours when he wrote:

“...the rule of law contrasts with arbitrary government. Arbitrary regimes of centralized type have ruled much of the world in most of its

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<sup>36</sup> This divine mandate to kingship can be most famously seen in the stories of Saul and David in 1 and 2 Sam., and the Bisitun Inscription of Darius I. The Bisitun Inscription also demonstrates the importance of heredity for Near Eastern monarchs. Even before announcing his divine mandate, Darius seeks to legitimise his rule by presenting himself as ninth in the line of Achaemenid kings.

<sup>37</sup> Westbrook (2003b), 26.

<sup>38</sup> Westbrook (2003b), 26-27, 363-364.

<sup>39</sup> See Harris (2006), 4-5.

<sup>40</sup> Gagarin (2008a), 174-175, 244.

recorded history. In them the central power is the sole focus of loyalty and therefore the sole source of authority. It may confer rights on its subjects, but their rights are derivative and precarious; they cannot withstand the central power. Such regimes are often classified under the heading, ‘oriental despotism’.”<sup>41</sup>

The Archaic period is remembered in the sources as a time in which lawgivers established political reforms and set down bodies of laws.<sup>42</sup> Although they seem to have been given sweeping powers to carry out their task, Greek lawgivers are not presented as using their position to take power within a *polis*. Telling in this respect are fragments of poetry which are attributed to Solon.<sup>43</sup> In them he denounces the rule of a single person as the path which leads to the downfall of the people, and describes how he distributed power evenly between the common people and the wealthier members of the *polis*.<sup>44</sup> Herodotus records Solon as having left Athens for ten years once he had completed his project, so that the Athenians could not force him to repeal any of the laws he had made.<sup>45</sup> The story is anachronistic, at least in how Herodotus presents it, as several decades separated Solon’s reforms and

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<sup>41</sup> Sealey (1994), 155. Sealey’s determination to see the Greeks as distinct from their neighbours leads him to deny any similarity between *epikleros*, and the Hebrew *levirate*. Each law was intended to prevent a familial line from dying out, but as the *epikleros* was intended to provide a daughter with a husband when her father died without a male heir, and the *levirate* provided a husband to a widow with no sons, then this is sufficient for Sealey to ignore their obvious similarities and conclude the two have nothing in common; Sealey (1994), 83-87.

<sup>42</sup> Lewis (2007), 53-76.

<sup>43</sup> For the issues in taking the fragments we have as the exact compositions of Solon; see Lardinois (2006), 15-35.

<sup>44</sup> Solon fr. 9.

<sup>45</sup> Hdt. 1.29.

the reign of Croesus, but at the very least it offers insight into the way in which the Greeks of the fifth century viewed the role of the lawgiver as one in which the intention was to establish the rule of law, not to take power. By the same token, Herodotus' story of how Deioces came to power in Media demonstrates a Classical Greek view of how the role of the Near Eastern lawgiver was tied up with the establishment of autocratic rule.<sup>46</sup>

The legendary Spartan lawgiver, Lycurgus, is said to have formed a conspiracy, but instead of using it to take power for himself, he used it to institute major reforms. Chief among them was the institution of the *Gerousia*, a body of twenty-eight men, equal in power to the two royal houses, designed to create a balance between the kings and the Spartan people, much as Solon had claimed to have balanced power between the Athenians. Much as Solon had left Athens for ten years so he would not be forced to repeal his laws, Lycurgus also swore the Spartans to an oath that they would not change his.<sup>47</sup> There is considerable doubt as to whether there was a real Lycurgus who reformed Sparta, but again, his legend tells us a lot about what the Greeks thought of their lawgivers and their legal system.

In the case of Demonax at Cyrene, he was not even a member of the *polis* which he reformed, and many other Archaic lawgivers were outsiders invited in to reform a *polis* and they continued to be outsiders

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<sup>46</sup> Hdt. 1.96-101.

<sup>47</sup> Plut. *Lycurgus*; and see Buckley (1996), 69-80.

afterwards.<sup>48</sup> The Greeks also recorded stories of their lawgivers falling foul of their own laws. Diodorus Siculus tells the story of Charondas, who wrote many wise laws for his native city of Catina.<sup>49</sup> One day, Charondas mistakenly took a dagger into a meeting of the assembly, something he had passed a law against. When his enemies in the assembly discovered this, they accused Charondas of annulling his own law, in reply to which, Charondas took out his dagger and committed suicide, thus proving his willingness to uphold his laws, even at the cost of his life.

By contrast, Herodotus tells of Cambyses' desire to marry his sister, which was not the custom of the Persians. Cambyses called together the royal judges, who were responsible for administering the law in Persia, and asked them if it was permissible under Persian law for him to marry his sister. The judges told him they could find no law which allowed for a brother to marry a sister, but they did find a law that allowed the king to do whatever he pleased.<sup>50</sup> That the Greeks of the Classical period regarded rule by monarch and by law as a demarcation point between Greece and Persia is made explicit when Herodotus quotes the exiled Spartan king, Demaratus, telling Xerxes that the

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<sup>48</sup> "Laws were given... by Charondas of Catana to his fellow-citizens and to the other Chalcidic cities on the coasts of Italy and Sicily.... Philolaus of Corinth also arose as lawgiver at Thebes. Philolaus belonged by birth to the Bacchiad family"; Aris. *Politics* 1274a. For Demonax, see Hdt. 4.161.

<sup>49</sup> Diod. 12.11-19.

<sup>50</sup> Hdt. 2.31.

Spartans’ “master is the law, and they’re far more afraid of this than your men are of you”.<sup>51</sup>

The evidence suggests that the role of the lawgiver in Greece and the Near East did differ markedly. Near Eastern kings were responsible for making and enforcing the law, whilst Archaic Greek lawgivers attempted to balance the interests of the various factions within a *polis*, and they gave up their power once their task was completed.<sup>52</sup> Furthermore, the Greek sources record an array of magistracies with specific powers, specific procedures for bringing a case for arbitration and for rendering a decision, and in some cases, specific penalties also.<sup>53</sup> The Near Eastern law codes tend only to record the laws promulgated by the king with no instruction as how they are to be implemented, who is to implement them, or how those responsible for implementing them will be held to account.<sup>54</sup>

However, despite this, the distinction is not quite so clear cut.<sup>55</sup> There are examples of collective decision making and corporate polities in the Near East that are overlooked due to a focus in modern scholarship on the autocratic rulers and centres of power.<sup>56</sup> Greek lawgivers share a close similarity to those of the Near East in the form of a divine

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<sup>51</sup> Hdt. 1.104, tr. Waterfield.

<sup>52</sup> There is also the question as to extent the Near Eastern king was actually involved in the creation of laws; see Jackson (2008), 69-113, 257-276.

<sup>53</sup> Harris (2006), 14-25; Rhodes (1997), 528-529.

<sup>54</sup> Harris (2006), 15-16.

<sup>55</sup> Naiden goes as far as to suggest that an uncritical acceptance of Herodotus has misled modern scholarship to an understanding of an East/West, despotism/democracy paradigm; Naiden (2013), 80.

<sup>56</sup> See Jacobsen (1943), 159-172; Fleming (2004).

mandate for the dissemination of justice via the laws. Although the most famous of the Near Eastern lawgivers, Moses, received the laws directly from his god, the typical practice was for the monarch to hold a divine mandate by virtue of his position.<sup>57</sup> This was also true of the Greek lawgiver, who also held a divine mandate, most often in the manner of an approval by the oracle at Delphi.<sup>58</sup>

The Archaic Greeks did also know their fair share of autocratic rulers, to the extent that one epithet sometimes given to the Archaic period is the ‘age of tyrants’.<sup>59</sup> A tyrant was an autocratic ruler, and the role was one which carried with it the idea of absolute, personal power.<sup>60</sup> A tyrant was not beholden to the law, it was his choice whether to obey the law or not, and tyrants emerged during the period that many *poleis* were still developing their legal institutions and magistracies.<sup>61</sup> Consequently, many Archaic *poleis* experienced rule by autocrats who

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<sup>57</sup> See the prologue to LH, which lays out the divine mandate given to Hammurabi by Marduk. Likewise, the prologue to LL lays out the divine mandate given to Lipit-Ishtar by Enlil.

<sup>58</sup> This was a point noted as far back as Mühl (1933), though when discussed by later scholars it was often to dismiss its importance. That the oracle was given after the lawgiver had completed his task is sufficient for Finley to disregard it. For him, the lawgiver was self-reliant and held no divine mandate with any oracle being window dressing; Finley (1981), 101. Meanwhile, Gagarin dismissed it on the grounds that legal development in Greece occurred separately from the Near East, so any comparison would be misleading; Gagarin (2008a), 146-151. Conversely, Naiden has recently restated the similarities between the divine mandates received by Greek lawgivers and Near Eastern kings; Naiden (2013), 81-88. *Contra* to Finley and Gagarin, it is clear that the Greeks were no different from their eastern neighbours in seeking divine sanction for the laws promulgated by their lawgiver, even if it differed slightly in the presentation due to differences in context.

<sup>59</sup> See Andrewes (1956), 8; Ogden (1997), 87-130.

<sup>60</sup> Andrewes (1956), 7, 20-31; Lewis (2009), 2.

<sup>61</sup> Hawke (2011), 151; Lewis (2009), 2.



were not subject to the rule of law, something which is more associated with Sealey's 'oriental monarchies'.<sup>62</sup>

Unlike the lawgiver, the tyrant did not voluntarily lay down power and his reign ended in either his death, murder, or forced removal from power.<sup>63</sup> At least one Archaic tyrant, Pittacus of Mytilene, is also remembered as a wise lawgiver, and both he and Periander are listed alongside Solon among the Seven Sages of ancient Greece, blurring the lines between the two roles.<sup>64</sup> As democracy did not emerge until the very end of the period, the Archaic Greek *polis* was subjected to one of two forms of government, either oligarchy or autocratic rule.<sup>65</sup>

For all this, even if a fundamental difference is acknowledged between the autocratic rule of a Near Eastern king and the rule of law which governed ancient Greek *poleis*, there remain good grounds for considering them in the light of each of other. A legal idea could travel and adapt to its local circumstances, so influence in the field of law should not be dismissed simply because of constitutional differences.

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<sup>62</sup> According to Lewis, the tyrant may even exceed the monarch in his power as kings could be bounded by constitutional laws; Lewis (2009), 2. If there is any truth to Herodotus' story of Cambyses asking the royal judges whether the law allowed him to marry his sister, then it demonstrates that even the Persian king was not inherently conceived of as above the law. If there is not, then at the very least it demonstrates that the Greeks, and perhaps even non-Greeks responsible for the dissemination of the story, saw the king as being theoretically beholden to the law.

<sup>63</sup> In turn the manner in which the Athenian tyrants Peisistratus, Hipparchus, and Hippias, ceased to rule.

<sup>64</sup> Parker demonstrates the ways in which the offices of lawgiver and tyrant overlapped, though in regarding Solon as a tyrant because of the absolute power given to him, he overlooks the important distinction that once his task was completed, Solon laid down his powers; Parker (2007), 13-39. See also Lewis (2009), 21-27.

<sup>65</sup> Andrewes (1956), 14-16; Hansen and Neilsen (2004), 80-85; Lewis (2009), 3.

However, the difficulty faced by the legal historian investigating Greek and Near Eastern cultural exchange is that whereas a motif found in pottery or literature can point towards influence, that the Greeks punished intentional homicide with death, and so did the civilisations of the Near East, does not allow for the same type of claims to be made.

As significant evidence proving influence of the kind found in literature does not exist for legal development, then studies which have been carried out in this area have inevitably been speculative and contributed little to the understanding of Greek law. As a consequence, and in the current climate of openness to eastern influence, the tendency amongst legal scholars who are open to seeing the Greeks in a network with the Near East has been to see a form of ‘legal *koinē*’ at work in the region, rather than a diffusion of laws across it.<sup>66</sup>

Even if influence cannot be detected, then in whatever way Greek and Near Eastern societies chose to construct the legal framework within which they operated, the problems facing them were essentially the same. They each used the law to regulate the same kinds of conflicts and disputes, whether it was determining who owned what, how possessions are to be transmitted, or how to protect people from physical harm. These are areas that Westbrook and Wells term as ‘everyday law’, being that which regulates the relationships between people who are members of a society.<sup>67</sup> As the Greeks faced the same issues as their neighbours, then a study of how the Greeks approached

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<sup>66</sup> Hagedorn and Kratz (2013), 5.

<sup>67</sup> Westbrook and Wells (2009), 1-5.

the law in the context of one or more of their Near Eastern neighbours can be instructive in gaining a better understanding of each.

This legal *koine* and the principle of everyday law provide the context of the case studies presented in this thesis. They take as their starting point the idea that the Greeks were one culture amongst many in the region of the ancient Mediterranean and Mesopotamia. They were part of the same network as that of their eastern neighbours, and regardless of the way their legal systems developed in the Archaic period, they faced the same issues in regulating their day to day lives. As the study of Greek legal history has tended to be one which is a topic in and of itself rather than part of a wider study of the legal history of the region, then it means important context for understanding Greek legal history can be missed. This is not to say that differences did not exist between Greek legal development and that of the Near East, but that these differences should not isolate them when studying their legal history, much as the important differences that the theological motivation of the Hebrew texts offer in contrast to the rest of the Near East, does not remove them from the study of Near Eastern legal history. Rather, the differences, and the similarities, become highlighted when studied in a wider context, and point towards the specific societal circumstances which occasioned them.

This principle is applied in the two case studies which follow, the first of which focuses on a point of similarity found in Classical Athens and

in the Hebrew Bible, but distinct from the rest of the Near East.<sup>68</sup> The extent and role of homicide pollution beliefs in Classical Athens has had a tendency to be played down in modern scholarship due to influential works such as Robert Parker's *Miasma*, whose argument in part depends upon his assumptions about the function of homicide pollution beliefs in a society. The Hebrew Bible presents an example of a contemporary neighbouring society for which these beliefs are also found, and it provides an important point of comparison for testing those assumptions. The second case study addresses adultery law, an area in which the Greeks differed from their neighbours by incorporating it into a broader offence of *moicheia*. Although this difference has been recognised by most Greek legal historians, comparative work on these differences has usually stopped there.<sup>69</sup> A fuller comparison highlights important differences in the way in which the offences were punished, and these differences help to underline that *moicheia* was not simply adultery with some additional areas, but a different offence which encompassed what in the Near East would be treated as adultery.

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<sup>68</sup> Comparisons between Greece and Israel are not new. As long ago as the 1960's, de Ste. Croix wrote of the remarkable parallels in the contemporary social situations of Solonic Attica and *Nehemiah*; de Ste. Croix (2004), 118-123. Hagedorn has published comparative studies of the relationship between the individual and the state, and of the characterisation of foreigners in Greece and Israel; Hagedorn (2004, 2007). Whilst Lewis has studied the solutions that each state devised to deal with social inequalities; Lewis (2017), 28-49. Studies such as these are not common. Not only does the comparative study of ancient Greece and Israel require crossing the divide between Greek and Near Eastern scholarship, but as the Hebrew texts have primarily been the domain of theologians in modern scholarship, a disciplinary divide has existed also.

<sup>69</sup> David Cohen did go further, but only to make the argument that *moicheia* was in fact adultery. A fuller discussion of which can be found in the case study.

## Use of the Texts and Sources

Before moving onto the case studies, some notes on the use of the texts should be addressed. All translations of the Hebrew Bible are from the NSRV unless otherwise noted. Equally, all translations of the Near Eastern law codes are by Martha T. Roth unless otherwise noted.

The use of the Hebrew Bible as a historical source for ancient Israel and Judah is problematic to say the least. It is not known when many of the books of the Hebrew Bible were composed nor by whom they were composed. Many of the books, especially those from Genesis to Numbers, are almost certainly the result of the compilation and redaction of multiple other sources spread across several centuries. Compounding these issues, a theological rather than a historical agenda underpins the composition of all of the books in the Hebrew Bible.

Consequently, an enormous amount of discussion and disagreement over how to use the texts has been generated in both textual and archaeological scholarship. The documentary hypothesis and the Deuteronomistic history represent dominant paradigms for approaching the books from Genesis to 2 Kings, and even though the former in particular has received much criticism, no alternative has been able to replace it.<sup>70</sup> An extreme minority ‘minimalist’ view holds

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<sup>70</sup> “New interpretations of narrative and law are constantly being proposed in journal articles, and large tomes keep appearing which challenge or reaffirm conventional hypotheses about the composition of the Pentateuch. But this only underlines the fact that no new paradigm or scholarly consensus has emerged to displace the old theories... I suspect that if a poll of contemporary OT scholars were conducted, only a minority would endorse one of the modern models.”; Wenham (1996), 3. For the documentary hypothesis see Wellhausen (1885); whilst for the Deuteronomistic history see Noth (1981). For a selection of

that the Hebrew Bible has no value as a historical source for anything prior to the Hellenistic period, whereas the most optimistic, ‘maximalist’ view accepts the historicity of everything from the time of the United Monarchy in the tenth century onwards.<sup>71</sup>

Prior to the ninth century, reconstructions of Israelite history are dependent on the Biblical texts themselves, as no contemporary external evidence attests to the existence of a large Israelite kingdom in the tenth century.<sup>72</sup> Whilst very little written evidence survives from the Iron Age II period in either Israel and Judah, correspondence and inscriptions from neighbouring civilisations do survive, and these help to build a framework independent of the texts which lends significant support to the account of 2 Kings.

An Aramaic inscription from either the ninth or eighth century makes explicit mention of the killing a king of Israel, and also makes mention of a *BYTDWD*, a ‘House of David’, or Judah, which finds parallel in 2 Kings 8.28-10.33 and speaks to the existence of both Israel and Judah in this time.<sup>73</sup> Neo-Assyrian inscriptions from the same period make

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criticisms and alternatives to the documentary hypothesis, see Alter (2011); Van Seters (1975), 123-308; Rentdorff (1990); Whybray (1987), 20-120, 221-242.

<sup>71</sup> See Davies (1992), 16-74, and (2004), 148-150; Dever (1993), 706-722; (2001), 44-45; Finkelstein (1988), 295-314; (1999), 36; Lemche (1998), 155; Lyman *et al* (2005) 222; Rainey (2001), 140-149; and Thompson (2000), 80. The minimalist approach is flawed on two main grounds. The first is that they do not adequately grapple with the archaeological evidence, whilst the second is that in their assumption that the texts cannot recover the history of the period, they deny the application of the historical method to them; see Dever (2001), 29, 45; Faust (2006), 25.

<sup>72</sup> See Faust (2010), 122-128, for an example of the maximalist reliance upon the Biblical texts to interpret archaeological evidence from prior to the ninth century.

<sup>73</sup> See Lemaire (1998), 3-10; Athas (2005), 175-191, 217-244.

references to several Israelite kings.<sup>74</sup> The first explicit reference to Judah is found in an eighth century Neo-Assyrian inscription that has a parallel in 2 Kings 16.7.<sup>75</sup> The destruction of Samaria and the mass deportation of much of the population of Israel is recounted in Neo-Assyrian inscriptions and 2 Kings 17.5-6, and the siege of Jerusalem is likewise found in Neo-Assyrian inscriptions and 2 Kings 18.9-10.<sup>76</sup> Two Neo-Assyrian kings both mention Manasseh, whose reign is recounted in 2 Kings 21.1-18.<sup>77</sup> 2 Kings ends with Jehoiachin in Babylonian exile, from where a Neo-Babylonian administrative document survives which refers to the amount of oil which is to be provided to him and his sons.<sup>78</sup>

Whilst these correspondences do not mean that 2 Kings or any other text of the Hebrew Bible should be taken as reliable historical witnesses to all they recount, they do offer confidence that Israel and Judah did exist in this time in the manner that the Hebrew Bible presents them. Even with all of the issues the texts present, they can be used as long as care is taken to use them with their deficiencies as historical sources in mind. Specific narrative accounts may be suspect, but the background material they capture need not be. For example, the story of Ruth may not be an actual historical account, but its presentation of the levirate must reflect an actual practice for the story to make sense to its intended audience. Likewise, whilst identifying the exact

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<sup>74</sup> ANET 279, 280b; Elat (1975), 25-35; Pitard (1987), 145-150.

<sup>75</sup> ANET 282a.

<sup>76</sup> ANET 284b-285, 288.

<sup>77</sup> ANET 291-294.

<sup>78</sup> ANET 308c.

provenance of legal material such as the Covenant Code is difficult to the point of impossible, that Exodus has captured actual legal material from some point in Israelite history is a reasonable assumption.

The Hebrew Bible has been used in these case studies with these limitations in mind, with further discussion where necessary. Reference is made to the sources of the documentary hypothesis when discussing the texts, though that should not be taken as a tacit endorsement of all aspects of the hypothesis, but rather the recognition that some of the material can be identified as originating from a common source.

The Greek sources tend to be less problematic in comparison, although that is not to say there are no issues in using them. Authorship is not always clear, nor when a text was written nor the exact circumstances which occasioned it. The text of laws and witness testimony is often preserved in an Attic legal speech. Some of these instances are undoubtedly not original to the text but are later insertions, casting doubt over the validity of many others. Much as with the Hebrew Bible, some legal material is captured in a non-legal context, such as that of the *Constitution of the Athenians* or Attic comedies. Where this is relevant to the use of a source it is noted and discussed.

It is not clear the extent to which the Near Eastern law codes represent actual legal practice. Where they overlap, there is often not correspondence between other Near Eastern legal documents and the law codes, and these documents in turn rarely make any reference to



the law codes.<sup>79</sup> This is less of a concern for the homicide pollution case study, where the Hebrew Bible forms the core of the comparative material. The law codes are, however, a major source for Near Eastern adultery law. They are used in the case study in conjunction with legal documents, and the resultant picture is sufficiently coherent to offer confidence in using them. Finally, all dates are B.C.E. unless stated otherwise or clear from context.

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<sup>79</sup> See Roth (1995), 4-7.

## A Comparison of Homicide Pollution Beliefs in Classical Athens and the Hebrew Bible

### Introduction

The societies of the ancient Mediterranean and the Near East often reflect a belief in what is usually termed ‘pollution’ by modern scholarship. This was a state of spiritual uncleanness that certain acts or deeds could impose upon a person if he or she either carried them out or was subjected to them. For the duration in which a person was in this state, they posed a risk to those around them, able to pass on or otherwise infect that which they came into contact with, and they were often separated from society in some manner until they were purified. This pollution could often be the result of circumstances which were not secular offences, and often they were ones over which the polluted person had no control. Bodily emissions, such as menstruation,

childbirth, or ejaculation, could be a common source of pollution, and bring on an unclean state that the person was neither morally responsible for, nor capable of avoiding. These forms of pollution created a state of uncleanliness which was temporary, with the person returning to society after a fixed period of time, and after performing the appropriate purification rituals.

It was also possible for a person to incur a 'moral' pollution if they committed certain types of offences, and exactly which offences caused a person to become polluted could vary from society to society. In Classical Athens, many sources there reflect the belief that as well as being a secular offence, homicide was also one which caused the perpetrator to become polluted. So severe and lasting was this pollution that in the case of intentional homicide, simply being removed from the *polis* for a set period of time was not sufficient to deal with it. The perpetrator had to be permanently removed, either by death or by exile, to remove their pollution from the *polis*, and with it the risk it posed to the community.

Despite the abundance of sources for homicide pollution beliefs in Classical Athens, there has been a tendency in ancient Greek scholarship to de-emphasise them as reliable evidence for the existence of any actual belief in it by the Athenians due to influential studies such as Robert Parker's *Miasma*. Parker in turn was himself heavily influenced by the work of Mary Douglas, who in her own monograph, *Purity and Danger*, had established a functionalist interpretation of pollution beliefs as a system created by a society to express its unease

over areas which fell outside of social classifications. Parker applied this functionalist understanding of pollution to ancient Greece, and in his search for a function for homicide pollution in Classical Athens, he concluded that the sophisticated Athenian judicial system meant that by the fourth century at the latest it could have had no place there. Instead, where it was found in the Classical sources, Parker argued that it was a relic of an earlier period, and one which was in the process of being evolved out of Athenian discourse. Parker placed the actual context for Greek homicide pollution beliefs back several centuries to the time of the Homeric epics; and, despite the lack of any evidence for it in them, he speculated that it was in fact to be found there.

Homicide was an offence of the utmost seriousness in the ancient world, and the intentional and unlawful killing of another person was almost always considered a capital offence. Even where there were mitigating circumstances such as lack of intent, the perpetrator could still expect to at least be punished by exile. Yet despite the seriousness with which all Near Eastern societies regarded homicide, at least where sufficient legal evidence survives to demonstrate, they did not reflect the same belief as the Athenians that carrying out an unlawful killing caused the perpetrator to become polluted. It is not that moral pollution that corresponds with secular offences is not found in Near Eastern societies, but where it is, it is usually in instances where the offence was sexual in nature. Whatever concern existed in Classical Athens that drove them to attribute pollution to the act of homicide, did not exist in the Near East.

There is, however, one notable exception to this. Studies of Classical Athenian homicide pollution, such as that of Parker, have been largely contained to the Greek evidence. It was not his intention to produce a comparative study of homicide pollution beliefs and so his conclusions were drawn almost solely from the Classical Athenian evidence. The Hebrew Bible contains an extensive doctrine of pollution that covers many different circumstances, and pollution incurred for homicide is found within it in multiple places. This makes the Hebrew Bible a useful point of comparison for examining the homicide pollution beliefs found in Classical Athens, and conclusions drawn about the function of homicide pollution in Classical Athens should be able to be tested against the function of homicide pollution in the Hebrew Bible.

In both Classical Athens and the Near East, homicide was usually seen as a private offence. It was regarded as being an offence to the victim, and thus the right of redress also fell to the victim. As they could not exercise this right, it instead devolved down to the next of kin to carry out for them. This stands in obvious contrast to modern legal systems, which usually regard homicide as a public offence, one that is to be prosecuted by the state, not by the next of kin. In line with their neighbours, the homicide legislation of both the Classical Athenians and that found in the Hebrew Bible did also regard the killing as a private offence to the victim, with the right of redress falling to the next of kin. What separated these from other societies in the Near East, and the one envisaged in the Homeric epics, which also betray no belief in pollution for homicide, was their communal concern over the offence.

This case study aims to examine the evidence for homicide pollution in Classical Athens with the aid of the evidence for homicide pollution in the Hebrew Bible. In so doing, it challenges the view that homicide pollution beliefs have little to no place in the Classical Athenian imagination or its homicide legislation. It will show that rather than having no function in the society of fifth and fourth-century Athens, the way homicide pollution is presented in the sources fits precisely into this context as the conflict between a private legal wrong, and the communal concern it caused. This was a concern not shared by other societies outside that of the Hebrew Bible, which in the same way, but for different reasons and expressed in a different way, used homicide pollution as the imaginative expression of the concerns of a community towards what was usually a private offence.

Before delving into the Athenian and Hebrew evidence, the first part of this case study comprises a review of the scholarship on pollution beliefs. The work of Mary Douglas informs the work done by Parker to such an extent, that to understand Parker's arguments on Classical Athenian homicide pollution requires an understanding of Douglas' ideas on pollution. Douglas herself was reacting to and building upon previous scholarship on pollution, and this is briefly touched on to give the context for her work. Then, the criticisms that her work has subsequently attracted are examined, which provide important context for examining scholarship on Classical Athenian pollution beliefs.

The following two parts examine Athenian and Hebrew homicide pollution beliefs respectively. As their homicide pollution beliefs

correspond closely with their legislation on homicide, each part begins with a survey of their homicide laws. Both societies recognised different degrees of homicide in their legal system, and the degree of pollution incurred by the killer corresponded to this. The more severely each society regarded the killing, the more severe the degree of pollution the killer incurred. There then follows an examination of the beliefs themselves and the ways in which they were expressed. The final part builds upon all of this to reconstruct the exact function of homicide pollution in Classical Athens.

### [Review of the Scholarship on Pollution](#)

The study of pollution beliefs is dominated by the work of the anthropologist, Mary Douglas, and her monograph, *Purity and Danger*.<sup>80</sup> Although many of its arguments have been challenged since its publication in 1966, and Douglas herself has refined a number of her conclusions, its central ideas have remained the cornerstone of all subsequent debate on taboos and pollution. In the book, Douglas challenged a number of prevailing scholarly opinions on the origins and purpose of pollution beliefs.<sup>81</sup> In the late-nineteenth century, the theory of the history of religions had produced an understanding of pollution as the by-product of the primitive desire to avoid danger. This theory was championed by the anthropologist, James Frazer, who had

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<sup>80</sup> "Since its publication... (it) has remained the single most important work in the study of impurity across human culture"; Lennon (2014), 4.

<sup>81</sup> Douglas (2002), 8-35.

argued that there were three phases of philosophical evolution; the first was primitive magic, this was followed by religion, and then the final stage was science.<sup>82</sup> Frazer argued that the primitive mind was capable of reason, but without science to aid it, it instead appealed to magic.<sup>83</sup> With regard to taboos and pollution, Frazer stated that as the rules for ceremonial purity found amongst primitive societies did not vary much whether they related to divine kings and priests, or to homicides and childbirth, then the primitive mind made no distinction between what would now be considered the separate categories of holy and unclean.<sup>84</sup> These concepts were not yet differentiated in the primitive mind, and instead, what defined these elements was danger.<sup>85</sup> All persons or objects under taboo presented the primitive mind with a spiritual danger, and the taboo served as a negative magic designed to separate the primitive from the source of the danger.<sup>86</sup>

Douglas thoroughly rejected Frazer's theories, and although she also took issue with some elements of another of Frazer's contemporaries, Emile Durkheim, her approach owes a lot to his work.<sup>87</sup> Durkheim had argued that religion is a natural product of social life, and that all known religious beliefs presupposed a classification of all things into two categories, defined by him as the sacred and the profane.<sup>88</sup> According

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<sup>82</sup> Douglas (1978), 10-11.

<sup>83</sup> Douglas (1978), 11-12.

<sup>84</sup> Frazer (1911), 224.

<sup>85</sup> Frazer (1911), 224.

<sup>86</sup> Frazer (1911), 224. See also Frazer's contemporary, William Robertson Smith, who similarly argued that taboo took the place of what religion would consider holiness and uncleanness; Smith (1901), 152-153.

<sup>87</sup> Douglas (2002), 23-29.

<sup>88</sup> Durkheim (1995), 34, 418-448.



to Durkheim, the religious mind imagined these two categories as completely separate, and it experienced repugnance at the thought of them mingling.<sup>89</sup> Sacred things are isolated and protected by prohibitions, and these are applied to profane things to ensure that the two are kept separate.<sup>90</sup> Durkheim dealt with taboos and the punishments derived from transgressing them in a monograph on incest taboos.<sup>91</sup> In it, he argued that taboos had both a functional and a symbolic purpose; they were the expression of the beliefs of the societies that produced them, and they complemented or even replaced the physical manifestation of a society's power.<sup>92</sup> In the case of incest, blood symbolised the relationship between members of a clan. Consequently, powerful taboos attached to avoiding spilling or contacting it, even indirectly, and this extended to a ban on sexual relations between members of a clan.<sup>93</sup> Unlike with the theory of Frazer, blood itself as a substance held no inherent danger. In the correct circumstances, it could even be seen as beneficial, and it was only in certain contexts, such as incest, where it posed a threat.<sup>94</sup> The taboo on blood fitted what Durkheim saw as the sacred, and the taboos were the prohibitions which prevent it mingling with the profane.

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<sup>89</sup> Durkheim (1995), 37. Durkheim argued that the whole universe could be divided into these categories, and that these were profoundly differentiated and radically opposed each other. The two could not approach each other and keep their own natures; Durkheim (1995), 39-42. See also Lukes (1973), 24-28 for a discussion of Durkheim's ideas on the sacred and the profane, and the criticism of them.

<sup>90</sup> Durkheim (1995), 38.

<sup>91</sup> Durkheim (1963).

<sup>92</sup> Durkheim (1963), 18-19.

<sup>93</sup> Durkheim (1963), 77, 88-89.

<sup>94</sup> Durkheim (1963), 94-95.

Douglas is indebted to Durkheim for the idea that religion demonstrates and reaffirms the values of society, but she took issue with his separation of ‘magic’ from ‘religion’.<sup>95</sup> For Durkheim, although magic was superficially similar, it was differentiated from religion because it actively profaned the sacred.<sup>96</sup> Durkheim argued that the demarcation point between the two was that religion represented the expression of a society, and served to bind it together, whereas magic did not.<sup>97</sup> For Douglas, this was an inadequate explanation for the similarities between the two, and as a result it led to an inadequate definition of the sacred, and of its relationship to the profane.<sup>98</sup> It could not account for all the circumstances in which a given society classified something as impure, and so Douglas sought in her work on pollution to provide a comprehensive explanation that was capable of doing this.

Douglas focused her theories around a structure of social classifications and of transgressions between these classifications. Douglas described ‘dirt’ – by which she meant something which is polluted - as “matter out of place”.<sup>99</sup> According to Douglas, nothing could inherently be classed as dirt, but rather, it only became dirt under certain circumstances in which it was seen as being out of place. Dirt signalled a “systematic ordering and classification of matter”, as it demonstrated

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<sup>95</sup> Durkheim (1963), 39; Douglas (2002), 27. Durkheim was indebted to Robertson Smith, who saw ‘religion’ as communal and with the good of the community at heart, and magic as outside this; Lukes (1973), 450.

<sup>96</sup> Durkheim (1963), 40.

<sup>97</sup> “There is no Church of magic... the magician has a clientele”; Durkheim (1963), 42.

<sup>98</sup> Douglas (2002), 27.

<sup>99</sup> Douglas (2002), 44. In *Purity and Danger*, Douglas does not conceptually distinguish between dirt and pollution; Meigs (1978), 310.

which elements were considered inappropriate when they were out of place.<sup>100</sup> Douglas retained Durkheim's idea that the sacred and profane were projections of society, but by casting prohibitions and pollution in these terms, she was able to do away with the problematic distinction between religion and magic in favour of a method which had the flexibility to be applied meaningfully to any society or culture. Further, it also did away with the idea that taboos were manifestations of the fears of the primitive mind.<sup>101</sup> Douglas' views on pollution are primarily both functionalist and symbolic. For her, pollution beliefs served as the function for a society to define what it regarded as dirt, to define what is out of place, and then the rituals that surrounded this were symbolic of social processes.<sup>102</sup>

A major source of pollution in Douglas' view was that caused by boundary transgressions. In this she was influenced by a study by Gennep in which he had argued that social relationships occurred within defined boundaries. When a person crossed from one relationship state to another, such as with birth, coming of age, marriage, and death, it resulted in a period of separation from society, a liminal state, during which time the person was both at risk and a risk to those around them.<sup>103</sup> Douglas built on this to argue that as dirt required a system of order and classification, then anything which could not be classified according to the system was in a liminal state,

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<sup>100</sup> Douglas (2002), 44.

<sup>101</sup> Douglas (2002), 1-2.

<sup>102</sup> Douglas (2002), 27.

<sup>103</sup> Gennep (1960).

and contact with it carried the risk of pollution.<sup>104</sup> Douglas put this theory to the test with a case study of the animals regarded as clean and unclean in Leviticus.<sup>105</sup> Rather than representative of primitive hygiene beliefs, she argued that the unclean animals were those which did not fit into Israelite classifications of animal types, and the prohibition on eating them served to maintain the symbolic boundaries.<sup>106</sup> This same principle was applied by Douglas to a different form of pollution found in Leviticus, that of pollution caused by wicked deeds. To be holy required individuals to be in conformity with the class in which they belong, and that the classes also not be confused, so impurity which attached itself to deeds such as adultery and incest was an expression of the boundary transgression that the act implied.<sup>107</sup> The other primary source of pollution that Douglas identified was the body, as the body itself was both a boundary and a symbol for society.<sup>108</sup> Bodily emissions transgressed the body's boundary, and rituals around emissions were a microcosm of the powers and dangers credited to the social structure.<sup>109</sup>

Although *Purity and Danger* remains the defining study on pollution beliefs, it has attracted a number of criticisms. Douglas' theories on unclean animals in Leviticus became a particular focus of criticism, to

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<sup>104</sup> Douglas (2002), 51.

<sup>105</sup> Douglas (2002), 51-72.

<sup>106</sup> For example, a pig transgressed boundaries by having a cloven hoof but not chewing cud, so it did not fit into the cattle category. It was unclean for this reason, not because it was considered to be a dirty animal due to its scavenging habits; Douglas (2002), 68.

<sup>107</sup> Douglas (2002), 66-67.

<sup>108</sup> Douglas (2002), 142.

<sup>109</sup> Douglas (2002), 142.

the extent that Douglas herself came to modify them.<sup>110</sup> Aside from this specific area of weakness, the criticisms of her work have primarily revolved around two main areas. One was her attempt to offer an overarching theory of pollution, and the other her dismissal of non-functionalist aspects of pollution. Valerio Valeri pointed out that Douglas' theory of pollution did not account for the many examples in which the pollution came about via inappropriate contact, in which the subject became polluted through being temporarily in the wrong category, rather than outside the system altogether.<sup>111</sup> He further identified two different ideas on pollution which Douglas expresses, rather than the single unified system she sought to present.<sup>112</sup> The first idea places pollution in a secondary position in which it arises as a sanction that pre-supposes an offence, whereas the second gives pollution a primary position in which the sanction arises subsequently. Valeri saw this as a consequence of Douglas' attempt to reconcile two different ideas of pollution, one based on misfortune and the other on dirt.<sup>113</sup> Misfortune pollution is that in which an unfortunate event is tied to an earlier deed, and this is incompatible with dirt pollution as it arises after the fact, rather than from the transgression of a pre-existing structure, and so it undermined Douglas' overarching system of dirt pollution as a unifying factor in all pollution beliefs.

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<sup>110</sup> Valeri (2000), 74-76; Douglas (2002), xv-xvi.

<sup>111</sup> Valeri (2000), 70-71.

<sup>112</sup> Valeri (2000), 70.

<sup>113</sup> Valeri (2000), 70-73.

In *Purity and Danger*, Douglas had rejected what she termed ‘medical materialism’, a theory which saw all pollution fears and cleansing rituals as being the result of underlying primitive hygiene.<sup>114</sup> Although medical materialism was a product of the history of religions school, in which scientific medical understanding is seen as being preceded by irrational religious fears, some scholars have since argued that hygiene did play a greater part in pollution beliefs than Douglas had allowed for. Anna Meigs argued that the body was seen as possessing the life force of the individual, and thus it posed a potential threat if emissions from it gained access to the body of another.<sup>115</sup> Meigs went as far as suggesting that every pollution taboo derived from a fear of death.<sup>116</sup> She tackled Douglas’ views on dirt to argue that although many things can be out of place, only some pose a threat when they are. Something which is merely out of place but carries no danger is not polluting, and for Meigs, this is better termed as ‘mess’ as opposed to dirt.<sup>117</sup> An item out of place is only dirt, and consequently polluting, if it also carries a threat, and this threat is usually bound up with substances that can transgress and threaten the body’s boundary.<sup>118</sup>

Arguments in favour of hygiene as an aspect of pollution have also come from outside the field of anthropology. From epidemiology, Val

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<sup>114</sup> Douglas (2002), 36-40. It should be pointed out that Douglas did not reject the idea that pollution and cleansing rituals could be linked to hygiene. Rather that the overarching system which united them was matter out of place, dirt, whether this was related to hygiene or not; Douglas (2002), 40.

<sup>115</sup> Meigs (1978), 304-318.

<sup>116</sup> Meigs (1978), 312-314.

<sup>117</sup> Meigs (1978), 310.

<sup>118</sup> Meigs (1978), 310.

Curtis argued that hygiene and disgust pre-date society, and that a biological capacity for disgust has informed culture, as opposed to cultures simply defining what they regard as disgusting, and by extension this biological capacity for disgust has informed what a culture regards as dirt.<sup>119</sup> Curtis reconciled hygiene with dirt by arguing for a dialogue between inherent psychological feelings of disgust, scientific advances of understanding in hygiene, and the assimilation of these into local cultures.<sup>120</sup> In a wide ranging study of disgust, William Ian Miller, similarly to Meigs, identified life and its correlates, death and decay, as major triggers of the disgust reaction.<sup>121</sup> Although Miller accepts that Douglas' definition of dirt as matter out of place has much truth to it, he argued that bodily substances in particular cut across all cultural boundaries as polluting substances.<sup>122</sup> Against these studies, Lennon, has argued that too much emphasis is placed by them on feelings of disgust when discussing pollution, and too little on the social symbolism of the rituals attached to it.<sup>123</sup> Whilst this may be true, it is in large part due to the focus of their studies, as well as their reaction to Douglas for whom these elements played no part.

Douglas' theories on pollution profoundly changed the study of the topic and moved it away from an approach based both on primitive fear and a distinction between magic and religion. Her own more functionalist approach based on boundary transgressions, and on dirt

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<sup>119</sup> Curtis (2007), 663.

<sup>120</sup> Curtis (2007), 663.

<sup>121</sup> Miller (1997), 40, 106.

<sup>122</sup> Miller (1997), 34.

<sup>123</sup> Lennon (2014), 9.

as matter out of place, has served to greatly improve the understanding of pollution beliefs, and *Purity and Danger* has deservedly become the single most important study of the topic as a result. However, by focusing in so narrowly on this aspect, she failed to achieve her stated aim of providing an overarching theory of pollution that could be applied in all cases. Her theory on dirt pollution does not work in all cases, and as Miller pointed out, it is best suited to pollution belief systems wherein the rules are clearly spelled out.<sup>124</sup> Similarly, Valeri noted that her theory works particularly well in the context of post-exilic Judah as it was in large part inspired by a study of pollution in the Hebrew Bible.<sup>125</sup> Though even then, the application of the theory to the food laws of Leviticus failed to account for all the ways an animal could be considered polluting. Douglas' theory works less well in pollution systems which are less dependent on her classification of dirt, and by moving the focus away from areas such as hygiene and medical materialism, and towards structures and boundary transgression, however correctly, the result was that the element of disgust was totally abandoned as a source of pollution fears.

### Classical Athens

The homicide pollution beliefs of the Athenians were intrinsically wound around their understanding of homicide as an offence, and the

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<sup>124</sup> Miller (1997), 44-45.

<sup>125</sup> Valeri (2000), 73.



expression of that offence in their legal system. Classical Athens had a relatively sophisticated system of homicide legislation which recognised different types of homicide depending on the circumstances of the killing, and with no fewer than five different courts handling different types of homicide case. This section begins with a review of Athenian homicide law to give the necessary context for understanding the evidence for homicide pollution. It then reviews the main sources on homicide pollution. These, coupled with the preceding review of scholarship on pollution beliefs, provide the necessary groundwork for a reconstruction of the function and purpose of Athenian homicide pollution.

#### Classical Athenian Homicide Law

Classical Athenian homicide law was relatively sophisticated in comparison to neighbouring societies in the Near East. Whilst Near Eastern legislation tended to distinguish between intentional, unintentional, and lawful killings, the Athenians went further than this, and had multiple procedures and punishments available that depended on the circumstances of the killing. The Athenians distinguished between public cases, *graphe*, which were seen as offences against the community, and thus open for any free adult male to bring a prosecution, and private cases, *dike*, which were seen as a private wrong to the victim, and thus the right of bringing the prosecution fell

to the victim.<sup>126</sup> Classical Athenian legislation regarded homicide as the latter, and the killing was seen as an offence to the victim.<sup>127</sup> If the victim forgave their killer before dying then no case for homicide could be brought against them, as there had been no offence to the victim.<sup>128</sup>

Despite falling into the category of a private wrong, homicide legislation varied from other private cases in a number of ways.<sup>129</sup> Private cases in Athens were usually subject to a statute of limitations lasting five years, but this was waived in the case of homicide, presumably due to the seriousness with which the offence was regarded, and as the victim obviously could not prosecute, then the right to bring a case fell to the next of kin instead.<sup>130</sup> Homicide was unique amongst private cases in having an unusually lengthy and complex procedure for bringing it to trial, again reflecting the seriousness with which it was taken. To begin the process, a pronouncement first had to be made against the defendant in the *agora*, and a proclamation was made barring the accused from entering certain public spaces which likely included the *agora*, the lawcourts, public meetings, temples, and public religious ceremonies, effectively

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<sup>126</sup> See Tulin (1996), 3 n.5, for scholarship on the distinction between a *graphe* and a *dike*.

<sup>127</sup> The existence of a *graphe* for homicide was speculated on by MacDowell and Hansen; MacDowell (1963), 133-135; Hansen (1976), 108-112. MacDowell later abandoned this position in a review of Hansen's work; MacDowell (1978b), 175. In arguing for the existence of a *graphe traumatos* on the possible grounds that a *dike traumatos* could not be brought by the victim's family, Hansen acknowledged that it weakened his argument for a *graphe phonou*; Hansen (1983), 317 n.26.

<sup>128</sup> Dem. 37.59.

<sup>129</sup> Harris identifies eight differences between homicide legal procedure and regular private cases; Harris (2015), 11-13.

<sup>130</sup> Dem. 36.26-27, 43.57; Lys. 13.83.

removing the accused from the life of the *polis* until their trial was heard.<sup>131</sup> Then, the case had to be brought to the *basileus*, who conducted three pre-trial procedures over a period of three months.<sup>132</sup> As the *basileus* only served for a year and these pre-trial meetings had to be conducted by the same person, it meant that a trial for homicide could not be brought in the final three months of a *basileus*' term.<sup>133</sup> After the pre-trial hearings, the case was assigned to the relevant court for hearing on the following month, meaning that depending on when in the year the killing occurred, it could take as much as six months before the case came to trial.<sup>134</sup>

There were five different courts for trying cases of homicide, with the location of a homicide trial chosen based upon either the circumstances under which the killing occurred or the defence that was offered by the accused.<sup>135</sup> The Areopagus tried cases of intentional homicide perpetrated against Athenian citizens. If a plea of lawful killing was made by the defendant, then the case was tried at the Delphinion by a panel of fifty-one men known as the *ephetai*. The *ephetai* also heard cases at the Palladion if the homicide was involuntary, of a foreigner or slave, or if the homicide was planned but not successfully carried out. If a person accused of intentional homicide was in exile due to a previous conviction for involuntary homicide, then he had to make his

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<sup>131</sup> Antiph. 6.35-40; *Ath.Pol.* 57.4; Dem. 20.158.

<sup>132</sup> Antiph. 6.42.

<sup>133</sup> Antiph. 6.42.

<sup>134</sup> Antiph. 6.42.

<sup>135</sup> These are laid out at *Ath.Pol.* 57.2-4; and Dem. 23.67-78. See also Carawan (1998), 84-175.

case offshore whilst standing on a boat. These trials were also carried out by the *ephetai* and took place at the Phreatto. If a homicide had been committed by an unknown person, animal, or inanimate object, then the trial was held at the Prytaneion, and overseen by the *basileus* with the four *phylobasileis*.

The Athenian courts allowed for the prosecution of a person involved in a homicide even if they did not actually do the killing themselves, and for a person who planned a homicide but did not succeed in carrying it out.<sup>136</sup> Killings were considered lawful if they occurred against an intruder into a home in the night, a person found on top of a wife, mother, sister, daughter, or concubine, accidental deaths in the course of an athletic contest, mistaking an ally for an enemy during war, dying whilst under the care of a doctor, preventing tyranny, and self-defence where proof could be shown that the victim struck the first blow.<sup>137</sup> There was a distinction drawn between intentional and involuntary homicide, although if a person died from injuries that were not intended to kill, then it seems that the perpetrator could still be prosecuted for intentional homicide.<sup>138</sup>

At the trial, the litigants had to swear an extraordinary oath that they were telling the truth, invoking destruction on themselves, their relatives, and their household if they were not.<sup>139</sup> Both sides gave two speeches, witness testimony could be brought, and it may even have

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<sup>136</sup> Antiph. 1, 6; Harris (2006), 391-404.

<sup>137</sup> Antiph. 4.2; Dem. 23.53-55; Lycurgus 1.125; Lysias 1.30; IG I<sup>3</sup> 104.

<sup>138</sup> Dem. 54.25; Ps.Aristotle, *Great Ethics* 1188b.

<sup>139</sup> Dem. 23.67-69.

been the case that women and children were allowed to give testimony, something not normally allowed.<sup>140</sup> After the first set of speeches, the defendant had the option of either going into exile voluntarily or completing the trial.<sup>141</sup> If the trial was completed, the appropriate panel, depending on where the trial was heard, voted on the defendant's guilt, and the *basileus* pronounced the verdict.<sup>142</sup> If the defendant was found guilty of intentional homicide the penalty was execution and loss of property, whilst for involuntary homicide it was exile whilst retaining property.<sup>143</sup> An exile for involuntary homicide could return if he was pardoned by the victim's family, but for any homicide there was a bar on accepting a ransom money from the killer in lieu of punishment.<sup>144</sup> In cases where the identity of the killer was not known, or the killing had not been carried out by a person, then an unknown homicide was pronounced as an exile, and an inanimate object was thrown across the Attic border.<sup>145</sup>

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<sup>140</sup> Antiph. 5.13, 6.14; Dem. 23.69. The evidence for women and children as witnesses is found in Dem 47.70-73, where they are twice described as swearing oaths, though it is not clear what these oaths are for. Gagarin sees these as evidentiary oaths to the facts of the case; Gagarin (1979), 311. See also MacDowell (1963), 90-109. Tulin suggests the family would swear an oath in the capacity of oath-helpers, and would be supporting the main oath, rather than swearing to any facts; Tulin (1996), 31-32.

<sup>141</sup> Antiph. 5.13.

<sup>142</sup> Following MacDowell's interpretation of the evidence for the role of the *basileus* at the trial; MacDowell (1963), 37-38.

<sup>143</sup> Antiph. 6.42; *Ath. Pol.* 47.2; Dem. 21.43; Lys. 1.50.

<sup>144</sup> Dem. 23.35, 23.72, 37.59, 38.22.

<sup>145</sup> See Aeschin. 3.244 for the fate of an inanimate object. The symbolic exile of the unknown killer is implied by Andoc. 1.78, and Plu. *Sol.* 19.4, who each refer to the exile of those condemned at the Prytaneion. No firm evidence survives for the fate of animal. In Plato's *Laws*, the animal is to be killed; 873e. Given the close dependence of the homicide legislation of the *Laws* to Classical Athenian homicide law (see below), this may mean that the same punishment was applied in Athens.

There was also a sixth procedure by which a homicide could be prosecuted, which also provides an appropriate starting point for understanding Classical Athenian homicide pollution. If the defendant was seen in a place of worship or the *agora*, both public spaces that a person accused of homicide was barred from attending, then he could be captured, imprisoned, and handed over for trial.<sup>146</sup> Mention of a fine if the prosecutor does not get one-fifth of the votes indicates that this was a public action, and so open to any free adult male citizen to bring a prosecution.<sup>147</sup> This strongly suggests that if an accused killer entered a public space, then their presence there placed the entire community at risk, and, consequently, the concerns of the *polis* would at that point begin to take precedence over the rights of the victim in ensuring that the crime was dealt with. Exactly how an accused killer placed the community at risk in these circumstances is key to understanding why a belief in pollution for homicide existed in Classical Athens, and the role it played as the imaginative expression of the concerns of the *polis* over a killer residing in its midst. The next section surveys the sources for homicide pollution in Classical Athens, to build up a picture of exactly how it operated.

### Classical Athenian Homicide Pollution

Whilst there are references to homicide pollution spread across many sources, the two most complete expressions of a doctrine of homicide

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<sup>146</sup> Dem. 23.80.

<sup>147</sup> Isoc. 18.12. See Harrison (1971), 227.

pollution are found in Plato's *Laws* and in Antiphon's *Tetralogies*. The *Laws* presents a discussion between three men, one of whom has been given the task of creating a set of laws for a new colony on Crete. The act of homicide and the pollution it creates are so intertwined in this text, that Plato lays down the principle that a killer is polluted right at the beginning of the discussion of the laws on homicide, and each secular penalty is accompanied by a purification requirement also.<sup>148</sup> In certain circumstances, such as a killing occurring in the course of war, or a doctor treating a patient, the person is to be regarded as entirely free from guilt, and they require little to no purification for them not to be considered polluted.<sup>149</sup> Plato allows for the accidental killer to be free of pollution once they have purified themselves, with differing levels of purification required depending on the circumstances.<sup>150</sup> Even when purified, however, the killer must still go into exile for a year, else the anger of the dead man at seeing his killer be turned on him, and this even extends to staying away from the victim's native land as well as the colony on Crete if the victim did not originate from there.<sup>151</sup> As will be seen in the *Tetralogies*, the anger of the victim is an important source of pollution in Classical Athens, suggesting that here, the purification rituals undertaken by the killer only remove his pollution if he stays away from the *polis* for the prescribed time. The secular punishment of one year's exile is

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<sup>148</sup> Plato, *Laws* 864e-865d.

<sup>149</sup> Plato, *Laws* 874b-d.

<sup>150</sup> Plato, *Laws* 865a-d.

<sup>151</sup> Plato, *Laws* 865d-e.

inextricably bound together with an understanding of the pollution that the deed incurs.

If the killer enters temples and performs sacrifices whilst polluted, or does not stay away, then he is to be prosecuted for homicide by the victim's relatives. If they fail to do so, this will result in the pollution extending to them as well as the killer.<sup>152</sup> The man who kills in anger can also be purified, but in his polluted state he is excluded from the *agora* and athletic arena in addition to any holy places.<sup>153</sup> If the victim was killed by his slave, then his relatives can kill the slave without incurring any pollution.<sup>154</sup> Harsher penalties are laid down for kin-killing in anger, but in the case of self-defence, even a brother who kills a brother is not considered to be polluted.<sup>155</sup> The pollution of those who kill intentionally and with premeditation extends to their exclusion from any common place of assembly.<sup>156</sup> Once again, failure to prosecute causes the pollution to also infect the victim's next of kin.<sup>157</sup> The intentional homicide of kin allows for no purification of the pollution until the crime is repaid at the hands of their next of kin, even if this means the matricide must be reborn as a woman to be killed by her children.<sup>158</sup> The person who intentionally kills a close family member cannot be buried, and nor can his corpse even remain in the

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<sup>152</sup> Plato, *Laws* 865a-866b.

<sup>153</sup> Plato, *Laws* 867c-868a.

<sup>154</sup> Plato, *Laws* 868b.

<sup>155</sup> Plato, *Laws* 869c-d.

<sup>156</sup> Plato, *Laws* 871a.

<sup>157</sup> Plato, *Laws* 871b.

<sup>158</sup> Plato, *Laws* 872e-873a.



*polis* once he has been executed.<sup>159</sup> Instead, his naked corpse must be cast out, and the *archons* must throw stones at its head in atonement for the entire *polis*, so severe is the pollution the killer's deed has incurred.

The doctrine of homicide pollution that is revealed by these passages is one in which the degree of the pollution is very much tied to the perception of the seriousness of the offence, making this unquestionably a 'moral' pollution. It is not an indiscriminate or unavoidable pollution such as those incurred by bodily emissions, and it directly expresses the feelings of the community towards the act which incurred it. Only those killings for which the perpetrator could be seen as having no culpability at all, such as the doctor whose patient dies, carry with them no requirement of purification. If the killing is one which does allow for the killer to return to the community, they must first be made clean by the appropriate purification ritual.

In the main, homicide pollution in the *Laws* is expressed in the negative by the amount of purification a killer requires to be able to return to the community. When it is expressed in the positive, it is either in the context of the anger of the victim, such as that of the man killed unintentionally and who sees his killer in the places he used to frequent, or it is in the polluting quality of the victim's blood, such as when a killer is envisaged as having his hands stained with blood as he has not yet purified himself.<sup>160</sup> The pollution a killer incurs is not presented in

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<sup>159</sup> Plato, *Laws* 878a-c.

<sup>160</sup> Plato, *Laws* 864e.

the text as being indiscriminately contagious. Where contagion is overtly mentioned, it is in the context of the next of kin should they not bring a prosecution against the killer. However, a broader contagion is implied in the requirement to stay away from holy places, places of assembly, and in removing the most heinous of killers from the community in as full a manner as possible. Even if Plato does not present the killer as polluting everyone he comes into contact with, it is clear that his presence in the community does place at risk everyone within it.

The concept of the victim's anger as a source of pollution, and its ability to transfer to those who do not attempt to prosecute the killer, is a prominent feature of the *Tetralogies*. These are three pairs of speeches attributed to the orator, Antiphon, each of which presents a case for the prosecution and for the defence in a series of hypothetical homicide trials.<sup>161</sup> In the first prosecution speech, the speaker states that the entire city is polluted by the presence of a killer until he is prosecuted, and that failing to prosecute, or prosecuting the wrong

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<sup>161</sup> The authorship and providence of the *Tetralogies* has been debated in scholarship; see Gagarin (2002), 52-54, for a summary. See also Sealey for a summary of inconsistencies between the speeches and Classical Athenian law, and also similarities which he claims belong to a fourth century Athenian context; Sealey (1984), 71-85. Chief amongst these inconsistencies is the reference in two of the speeches to the prohibiting of unjust and just killings (3.2.9; 3.3.7; 4.2.3; 4.4.8). This is convincingly argued by Gagarin as referring to intentional and unintentional homicides, rather than any reference to the law prohibiting any killings, which would be at odds with Classical Athenian law; Gagarin (1978), 291-306. See also Gagarin (2002), 54-62 for a defence of Antiphonian authorship. Carawan, in arguing against Antiphon as the author of the *Tetralogies*, speaks of a majority view in scholarship that the speeches are the product of the orator's time, if not a majority view either way on authorship; Carawan (1993), 235. This case study retains the traditional attribution of Antiphon as the author of the *Tetralogies*, though it does not depend on it, nor on whether the speeches are fifth or fourth century.

person, will transfer the pollution to the ones responsible for prosecuting the killer.<sup>162</sup> Holy places and communal tables are identified as places which the killer pollutes with his presence, and this pollution can cause crops to fail and things to go wrong.<sup>163</sup> Removing his pollution from the city is identified here as one of the primary benefits of convicting a killer.<sup>164</sup> Conversely, the defendant claims that it is the prosecution who will be responsible for any failed crops as they are failing to punish the real killer, and consequently they are failing to deal with the real killer's pollution.<sup>165</sup>

The second case involves a boy killed unintentionally when struck by a javelin, and that a killer brings a pollution to the city is here again stated by the prosecution.<sup>166</sup> The defence rests on the claim that the boy was responsible for his own death by running into the path of the javelin; consequently, he leaves behind no avenging spirit.<sup>167</sup> The avenging spirit is to the fore in the third case. The prosecution here states that the victim, deprived of the gift of life, leaves behind hostile spirits as a divine instrument of vengeance.<sup>168</sup> These spirits are identified as a source of pollution which can pass to unjust prosecutors and witnesses.<sup>169</sup> The defence further claims that prosecuting him, an innocent man, for homicide will cause the avenging spirits to be turned

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<sup>162</sup> Antiph. 2.1.3.

<sup>163</sup> Antiph. 2.1.10.

<sup>164</sup> Antiph. 2.3.11.

<sup>165</sup> Antiph. 2.2.11.

<sup>166</sup> Antiph. 3.1.2.

<sup>167</sup> Antiph. 3.4.9.

<sup>168</sup> Antiph. 4.1.3.

<sup>169</sup> Antiph. 4.1.4.

onto the *dikastai*, and will bring double the pollution.<sup>170</sup> Although the emphasis is on pollution in the form of the victim's anger, which is designed primarily to bring a conviction against the killer, it is again stated that the killer's pollution affects the entire city.<sup>171</sup>

The focus of the *Tetralogies* is different from that of the *Laws*, and this accounts for some of the differences in their presentation of pollution. As these speeches are focused on convincing the *dikastai* to convict or acquit, then the purification rituals required of a polluted killer are not of concern. Nor are the varying degrees of pollution that different forms of killing can incur. Both the prosecution and the defence focus on the necessity of prosecuting the correct killer, and the dire consequences for failing to do so. Consequently, the threat to the *dikastai* from the victim's avenging spirit is emphasised, as is the risk the killer's pollution places the entire *polis* under. In common with the presentation of homicide pollution in the *Laws*, here it does not indiscriminately infect every person with whom it comes into contact, but it does risk infecting public spaces and those who fail to carry out their responsibility to prosecute the killer. Ultimately, in these texts it is the entire community that is placed at risk from the pollution of a killer within its midst.

It should be noted that despite their presentation as legal material, neither the *Laws* nor the *Tetralogies* are first-hand evidence of actual legal practice in Athens. Plato's *Laws* were for a hypothetical *polis* on

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<sup>170</sup> Antiph. 4.2.8; 4.4.10.

<sup>171</sup> In two different places: Antiph. 4.1.5.; 4.3.7.

Crete rather than actual legislation from Athens, and the *Tetralogies* are for hypothetical homicide cases. However, this does not diminish their value as evidence for Classical Athenian homicide pollution beliefs, as they remain strong evidence both for its existence and the way in which it manifested in the Athenian imagination. Plato adopts contemporary Athenian law as the basis for his detailed legal provisions, and there are many parallels between homicide legislation in the *Laws* and in that of Classical Athens.<sup>172</sup> Both recognise differing levels of culpability for a homicide, with some killings being entirely lawful. There is legislation to deal with killings caused by animals and inanimate objects, and unknown killers are symbolically exiled. Exile is also the punishment for unintentional killings, and both allow for the victim's family to pardon the killer which allows him to return. A person could be prosecuted for homicide if they were involved in the planning of it but did not carry it out with their own hands. Finally, in cases of intentional homicide, both prescribed the death penalty. There are some differences; for example, in Athens, the accused in an intentional homicide trial could choose to go into exile before the verdict was returned, whereas exile was only available in the *Laws* if the killer absconded rather than face trial.<sup>173</sup> These differences tend to

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<sup>172</sup> See Saunders (2004), xxxvi. Gernet considers the section on homicide to be the part of the *Laws* in which Plato conforms most closely to the laws of Athens; Dies and Gernet (1951), cxcv-cc.

<sup>173</sup> Plato *Laws*, 871d. Plato also adds two categories of homicide not found in Athens, differentiating between the person who retaliates in anger and then feels remorse, and the person who becomes angry then later kills with intent, and feels no remorse; 866d-867e. Even these demonstrate a dependence on Classical Athens, as Harris identifies them as an attempt to remove an ambiguity in Athenian homicide law. This is part of a broader strategy on Plato's part to

be minor, and the overall picture is of a well-developed set of homicide legislation very similar to the one in Athens. When coupled with the ample evidence for homicide pollution beliefs in Classical Athens, including the close correspondence between the *Laws* and *Tetralogies* with regards to the anger of victim and the risk posed to the next of kin if they do not prosecute, then there is good reason to assume that just as the homicide legislation of the *Laws* closely parallels that of Athens, so the expression of homicide pollution does also.<sup>174</sup>

The emphasis that the *Tetralogies* places on homicide pollution is not found to the same degree in speeches from actual homicide trials, making it reasonable to assume that actual litigants in these trials did not lean heavily upon it in trying to make their case, and for some scholars this is sufficient to dismiss them as evidence for actual homicide pollution beliefs.<sup>175</sup> However, arguments that depend on a common belief in homicide pollution certainly are present in legal speeches, and the topic is brought up in some speeches as evidence in support of the speaker's case. For example, the speaker in Antiph. 5.82-84 states that he has caused neither ship to sink nor sacrifice to fail, and he presents this as proof that he could not have killed Herodes. The implication is clearly that had he been guilty, he would have been a polluted killer. Similarly, Demosthenes defends himself from a homicide charge by stating that if his accuser had genuinely believed

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reduce what Harris terms 'open texture' from Classical Athenian law; Harris (2013), 189, 206-208.

<sup>174</sup> *Contra* Eck, who sees defilement as grafted onto Athenian homicide laws by Plato; Eck (2012), 320-321.

<sup>175</sup> For example, see Parker (1983), 104; Eck (2012), 252-253.

him guilty, he would not have allowed him to preside over public sacrifices.<sup>176</sup> As with the previous case, had he done so he would have risked the sacrifices failing due to his pollution. In Lys. 13.79, the speaker claims that no-one would share a table or tent with the accused because they knew him to be a polluted killer. Here, simple proximity to the accused places others at risk of being affected by the pollution. Purification language, which as has been noted in the case of the *Laws* presupposes the polluted state of the killer, is also used by speakers, such as at Dem. 9.44 and 20.158, where a lawfully allowed killing leaves the killer pure, and Dem. 23.52, where an exiled killer who returns with the permission of the victim's kin must first sacrifice and purify himself before he can return.<sup>177</sup>

Although the homicide laws themselves do not explicitly mention or discuss pollution, that is not to say that the legislation does not presuppose its existence. As has been seen in the case of the *Laws*, polluted killers are there required to stay away from certain communal spaces, and from certain holy places. Likewise, and as discussed in the preceding section, the homicide laws of Athens also required the accused to stay away from public spaces such as the *agora* and public sacrifices whilst they were waiting for trial. Due to the extended procedure for bringing a homicide case to trial, this would have been a period of time that would last at the minimum several months, and

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<sup>176</sup> Dem. 21.115.

<sup>177</sup> See also Dem. 37.59 for another example of the involuntary killer in exile described as impure, and Lyc. 1.125 and *SEG* 12.87 for the killer of a tyrant or an attempted tyrant remaining pure.

during which the accused would have effectively been excluded from the public life of the *polis*. Although no reasons are given in the law as to why an accused homicide had to stay away from these spaces, the logical conclusion to draw based upon the other available evidence is that if guilty, the accused homicide carried a risk of polluting these public spaces, and by extension their presence in them would place the entire *polis* at risk. Far better to keep an innocent person out of public spaces for a few months than to risk a polluted killer entering them.

This explanation is disputed by MacDowell, who draws upon passages found in Demosthenes and Lysias to argue that the sanction was a deterrent, and that the procedure which allowed for an accused killer to be immediately prosecuted if he entered these places was for occasions in which the defendant was manifestly guilty, and thus the prosecution could be expedited without need for the extended process usually required of homicide trials.<sup>178</sup> MacDowell first uses Dem. 20.157-158 to argue that rather than expressing any concerns over pollution, the restriction on entering certain spaces was instead seen by the Classical period as a deterrent, as in Dem. 20.158, the orator does claim that Drako passed the restriction on entering certain public spaces as a deterrent against homicide.<sup>179</sup> MacDowell acknowledges that this may

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<sup>178</sup> MacDowell (1963), 144-147.

<sup>179</sup> MacDowell (1963), 144-145. Eck also follows this Demosthenes passage to highlight a perceived difference between this and the similar legislation found in the *Laws*; Eck (2012), 319. As it was a deterrent in Athens but a mechanism to prevent the spread of pollution in the *Laws*, then this explains the latter's emphasis on the polluting quality of homicide. In fact, and as will be seen, the Athenian legislation is also concerned with preventing the negative consequences of homicide pollution from impacting the community. Rather than



not have been the original intent of Draco, but claims that this is how it was understood in the fourth century by Demosthenes.

Set in the broader context of the speech, it becomes clear that Demosthenes is making a rhetorical argument, and that he is very much aware of the polluting quality of homicide. Demosthenes is arguing for the repeal of a law introduced by Leptines, that removed all previous exemptions from liturgies that had been held by certain individuals, except for those granted to the descendants of Harmodius and Aristogeiton.<sup>180</sup> In attempting to argue for the positive benefits that these exemptions bring the *polis*, Demosthenes claims that if good deeds are always rewarded and wrong-doing always deterred by legal penalties, then the *polis* will be great, and full of good people.<sup>181</sup> In this context, he draws upon the most serious crime, homicide, to make his point, and it is for this reason he claims that the sanction on entering public spaces was a deterrent.<sup>182</sup> That the killer would be polluted does not help Demosthenes make his argument, but in the same passage, which was excluded from MacDowell's excerpt of 20.158, Demosthenes clearly demonstrates that he was aware that a killer was polluted, as he declares the perpetrator of a lawful homicide to be *katharos*, or ritually clean.

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highlighting a difference, it highlights a similarity and underlines the presence of homicide pollution beliefs in Classical Athens.

<sup>180</sup> Dem. 20.18.

<sup>181</sup> Dem. 20.154.

<sup>182</sup> Dem. 20.157-158.

Dem. 23.80 and Lys. 13.85-87 are then read together by MacDowell to argue that the procedure did not reflect concerns over a polluted killer entering public spaces, but was instead for circumstances in which a killer was manifestly guilty of homicide.<sup>183</sup> MacDowell speculates that this procedure may well have been introduced precisely because the usual procedure for prosecuting a homicide was so lengthy and complex, and thus ill-suited to circumstances in which a killer was ‘manifestly’ guilty of homicide.<sup>184</sup> In the case of Lysias 13, a man called Agoratus had been summarily arrested using the *apagoge* procedure, and had been taken to the Eleven on a charge of homicide. The prosecution alleges that some years previously, Agoratus denounced a number of men to the *boule* and the *ekklesia*, who were subsequently executed by the Thirty based upon this denunciation.<sup>185</sup> The Eleven allowed the arrest, but insisted that the phrase *ep’ autophoroi*, meaning that the guilt of the arrested person was in some way clear, be added to the plaint.<sup>186</sup> This passage is read by MacDowell in conjunction with Dem. 23.80, in which the procedure is presented as being applicable in circumstances in which the killer has entered holy places or the *agora*, to reconstruct the law as being one which applies when a manifestly guilty killer enters one of the proscribed places.<sup>187</sup>

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<sup>183</sup> MacDowell (1963), 146-147.

<sup>184</sup> MacDowell (1963), 146-147.

<sup>185</sup> Lys. 13.30-35.

<sup>186</sup> Lys. 13.85-86.

<sup>187</sup> MacDowell (1963), 146-147. The similarity of the circumstances presented in Dem. 23.80, and Dem. 24.105, is such that Demosthenes may be describing the same procedure in each instance; see Gagarin (1979), 315-316. However, Canevaro has convincingly argued that the law here is a later forgery. The *apagoge* procedure found in the law is not mentioned by Demosthenes in his

This argument is flawed in a number of ways. At no point in Lyisas 13 is Agoratus described as being summarily arrested in one of the proscribed places. Nor does Demosthenes anywhere state that the procedure only applied when the killer was manifestly guilty. These two passages have been joined together by MacDowell to make a reconstruction that is supported by neither. It would seem far more likely that the Eleven insisted upon the phrase *ep' autophoroi* being added to the plaint precisely because the arrest of Agoratus did not otherwise satisfy the requirement of the procedure. The phrase is elsewhere associated with *apagoge* procedures and likely meant the Eleven would not have accepted it as a valid arrest if the prosecutors did not in some way assert that the procedure was appropriate.<sup>188</sup> The defendant of Antiphon 5, Euxitheus, was arrested on a homicide charge using an *apagoge* procedure, and in his speech, he complains that the incorrect procedure has been used, and that he should have been prosecuted using the normal procedure for homicide. In addressing the prosecution's case, he reveals that they have justified the *apagoge* procedure on the grounds that Euxitheus would abscond if the usual three-month period before the trial was followed.<sup>189</sup> Nowhere does he make his complaint on the use of *apagoge* on the grounds that he was

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discussion of it, nor does he make any reference to homicide, and there are important differences between it and Dem. 23.80; Canevaro (2013), 171-173. Once the text of the law found in 24.105 is discounted, there is nothing in the discussion of it which would aid in a reconstruction of *apagoge* homicide.

<sup>188</sup> The phrase *ep' autophoroi* is also associated with the *apagoge* procedure at Isaeus 4.28. See Harris (2006), 373-390 for other examples, and a discussion of the exact meaning of this term. See also Todd (2000), 139.

<sup>189</sup> Antiph. 5.13. It also worth noting that despite the seemingly incorrect use of *apagoge*, the Eleven still allowed the prosecution to go ahead, presumably based upon the prosecution's justification for why it was warranted.

not caught *ep' autophoroi*, nor that this was usually a requirement for bringing an *apagoge* if an accused homicide entered a proscribed place. For Agoratus, *ep' autophoroi* had to be added to the plaint because the procedure was not otherwise being used correctly to bring a trial for homicide. Likewise, for Euxitheus, his prosecutors needed a reason as to why they could bring him to trial for homicide using *apagoge* as it also was not otherwise being used correctly. Dem. 23.80 demonstrates that the correct use of the procedure was when the accused entered the places forbidden by Drako's law on homicide. Had this been the case for Agoratus or Euxitheus, there would be no need to otherwise justify the use of the procedure.

In addition to this, if it is accepted that these two elements could be presumed by both texts, even if they each only discuss one of them, then the resultant procedure would make little sense. If the purpose was to circumvent the long, drawn-out homicide procedure when the killer was manifestly guilty, why could he only be subject to it if he entered the proscribed places? Alternatively, to come at it from the other direction, why would his guilt only become manifestly obvious if he entered one of those places? A law which was designed only to expedite a prosecution against a manifestly guilty killer would be undermined by a restriction on where it could be used.

MacDowell's argument also fails to address why the offence would only become one against the community if the killer entered these public spaces, and why it would remain a private offence to the victim as long as he stayed away from them. If the reason for this law was

that it was designed to protect the community from the pollution of a potential killer, then it would make sense that a private obligation on the next of kin would become a public concern if the accused entered the public spaces of the *polis*. It makes little sense that the offence would become one against the *polis* only in the circumstances in which a manifestly guilty killer entered a public space. A manifestly guilty killer would carry the same risk whether he attended a sacrifice or not. Conversely, the possibility that an accused killer whose guilt or innocence had not yet been established could be polluted would carry a potential risk to the *polis* if he attended a public sacrifice that needed to be legislated against.

Fifth century tragedies provide another set of sources in which homicide pollution is a prominent feature.<sup>190</sup> There are many examples to be found in Aeschylus' *Oresteia*. Clytemnestra is described as a *miasma* to her country and her country's gods for killing Agamemnon.<sup>191</sup> Orestes laments the pollution that killing his mother and her lover has brought him.<sup>192</sup> The Erinyes reproach Apollo as one of the gods who rule a throne polluted with blood contrary to justice.<sup>193</sup> Orestes tells Athena that he did not sit at her image polluted with blood on his hands.<sup>194</sup> The theme is also common in other works also. Oedipus describes the land as polluted following the murder of Laius,

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<sup>190</sup> See (Harris) forthcoming, for an examination of the similarities between homicide pollution in tragedy, and Athenian homicide law.

<sup>191</sup> Aesch. *Ag.* 1420. She is also later referred to as polluted by Orestes; *Ag. Lib.* 1028.

<sup>192</sup> Aesch. *Lib.* 1017.

<sup>193</sup> Aesch. *Eum.* 162-169.

<sup>194</sup> Aesch. *Eum.* 444.

and Creon attributes a plague to the same pollution.<sup>195</sup> Herakles describes himself as polluted for killing his children.<sup>196</sup> Pelasgus describes how the land had become so polluted from bloody deeds that it threw up plagues and monsters.<sup>197</sup> Theseus fled Athens to escape the blood-pollution he incurred from killing the Pallantidae.<sup>198</sup> Aside from specific pollution-incurring deeds, Sophocles writes that a killer is banned from houses and religious observances on account of his pollution.<sup>199</sup> Reminiscent of Antiph. 5.82-84, Aeschylus states that the righteous man goes down with the ship when the presence of evil company causes it to sink.<sup>200</sup>

Much as with the *Laws* and *Tetralogies*, these plays are not legal documents, but they share sufficient similarities with other Classical Athenian sources to be able use them to aid in a reconstruction of homicide pollution belief. The imagery of the blood of the victim is to the fore in these works, to a greater extent than is found elsewhere. However, the blood of the victim clinging to the killer's hands has already been seen in Plato's *Laws*, and it is alluded to in the instance of the polluted killers who can bring down a ship by their presence on it found in Antiph. 5.82. Here, Antiphon describes the hands of the killer as being *me katharoi*, or not clean, with the use of *katharos* denoting

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<sup>195</sup> Soph. *OT* 138-139 and 97.

<sup>196</sup> Eur. *Her.* 1155.

<sup>197</sup> Aesch. *Supp.* 264-265.

<sup>198</sup> Eur. *Hypp.* 35.

<sup>199</sup> Soph. *OT* 241.

<sup>200</sup> Aesch. *Seven* 597-609.

the polluted state. Although Antiphon does not state that it is specifically the blood of the victim that is causing the hands to be unclean, that the pollution attaches to the hands suggests the imaginative understanding of it is in the same territory as the blood that pollutes the hands of a killer in Aeschylus and Plato.<sup>201</sup> The anger of the victim that drives the next of kin to bring a prosecution, which is so prominent in the *Tetralogies*, is also found in the *Oresteia*, strongly suggesting that each is reflecting an actual expression of Classical Athenian homicide pollution belief.<sup>202</sup> The *Oresteia* also provides a further point of comparison, wherein the innocence or guilt of Orestes directly impacts upon whether he is to be considered polluted or not.<sup>203</sup> That pollution infects the killer, that it can have a negative impact on both him and those around him, that it can cause him to be kept out of communal and religious spaces, and that pollution can manifest in the form of the blood of the victim clinging to the killer, are all in line with homicide pollution as it is presented in other Classical Athenian sources.<sup>204</sup> This strongly suggests that if even the exact way in which it was presented on the fifth century stage could have been a trope of

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<sup>201</sup> Aesch. *Eum.* 444.

<sup>202</sup> Aesch. *Lib.* 269-296. See Harris (Forthcoming).

<sup>203</sup> The Erinyes consider him to be polluted, whereas Orestes claims he is not; Aesch. *Eum.* 235-240, 276-289, 313-320, 443-453. See Harris (forthcoming).

<sup>204</sup> See Harris (Forthcoming) for a comparison of homicide pollution in fifth century tragedies with Classical Athenian legal sources. These include Orestes' claim that he will be polluted if he does not avenge his father's murder, pollution accruing to Aegisthus for his role in planning the murder of Agamemnon, and a proclamation made by Oedipus banning the killer of Laius from participating in sacrifices; Aesch. *Lib.* 269.296, 944; Soph. *OT* 236-243.

the genre, this trope was based upon and dependent upon the actual beliefs of the audience.

This survey of the sources presents what is on the face of it, a largely unproblematic reconstruction of an actual belief in homicide pollution by the Classical Athenians. The sources for it cut across several different genres, including legal speeches and the law on homicide. They collectively are largely consistent in presenting a doctrine of homicide pollution that regarded a killer as polluted, with the degree of pollution varying in close correspondence to the degree of severity with which the killing was dealt with in law. They present a polluted killer as posing a threat to others if they share the same house, ship, table, or other public space such as the *agora*. Likewise, there is also a threat to holy places and to sacrifices if a killer enters them whilst in a polluted state. The next of kin and the *dikastai*, collectively being those responsible for bringing a successful prosecution against a killer, have a specific risk of pollution accruing to them if they fail in their duty. Finally, where the pollution is given an imaginative expression, it is either in the form of the blood of the victim, or the anger of the victim, with the latter particularly associated with a failure to adequately deal with the victim's killer. Yet despite this, much scholarship on homicide pollution in Classical Athens either disregards it or downplays it as an actual part of the Athenian imagination or a concern of Athenian legislation.



### Scholarship on Classical Athenian Homicide Pollution

Earlier scholarship on homicide pollution largely accepted both its existence in the Classical Athenian imagination and its expression in Athenian homicide legislation.<sup>205</sup> In the 1950s, E.R. Dodds presented a model of the ancient Greek mind based on a theory that societies are capable of being classified as either a ‘shame culture’ or as a ‘guilt culture’; a theory which was current at the time Dodds wrote.<sup>206</sup> According to this theory, in a shame culture, social control is exerted externally, with the shame acting as an external sanction derived from the perceptions of other members of the community.<sup>207</sup> As the Homeric hero was motivated by what others would think of his deeds, Dodds argued that he was representative of a shame culture.<sup>208</sup> By contrast, a guilt culture exerts control internally, and here the deeds that would have brought shame, now bring an internal feeling of guilt instead. A guilt culture imposes a standard of morality to which individuals hold themselves, and from which a religious unease arises on the part of the person who is feeling guilt.<sup>209</sup>

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<sup>205</sup> For example, see Adkins (1960), 112 n.22; Moulinier (1952), 82; Treston (1923), 247.

<sup>206</sup> Dodds (1951), 17-18. Dodds was drawing on Ruth Benedict who popularised the terminology in the 1940s to describe the differences between Japanese and American culture; Benedict (1946), 222-223. Margaret Visser followed Dodds in a paper on Athenian homicide pollution; Visser (1984), 193-206.

<sup>207</sup> Benedict (1946), 223.

<sup>208</sup> Dodds (1951), 17-18.

<sup>209</sup> Dodds (1951), 47.

According to Dodds, Greece moved away from shame and towards guilt during the Archaic period, and one consequence of this transition was the emergence in Greek society of a fear of pollution.<sup>210</sup> Whereas the Homeric hero had only his peers to fear, the Archaic and Classical Greek feared a supernatural sanction for his or her misdeeds due to the internal and religiously motivated feeling of guilt that those misdeeds brought about. Dodds further argued that this pollution was considered to be both contagious and capable of being inherited.<sup>211</sup> Consequently, a Greek could ‘catch’ pollution via contact with a polluted person, or be caught up in a misfortune brought about by the presence of a polluted person.<sup>212</sup> This meant that a Greek individual, and by extension the community, could be negatively affected by the presence of a polluted person, regardless of the quality of their own deeds.

The inadequacies of the shame-guilt dichotomy were later addressed by Douglas Cairns.<sup>213</sup> He noted that rather than a simple external sanction, shame corresponds to internalised standards. Rather than requiring an external audience, shame is ultimately felt via an internalised standard of oneself.<sup>214</sup> Cairns further concluded that shame and guilt are very difficult to distinguish from one another, and in usage they are more or less interchangeable.<sup>215</sup> Consequently, the

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<sup>210</sup> Dodds (1951), 35-37.

<sup>211</sup> Dodds (1951), 36. See also Rohde (1925), 295.

<sup>212</sup> Antiph. 5.82.

<sup>213</sup> Lloyd-Jones had earlier also taken issue with them, though he accepted that the labels could be applied in more relative terms; Lloyd-Jones (1971), 24-26.

<sup>214</sup> Cairns (1993), 16-18.

<sup>215</sup> Cairns (1993), 24-25.

applications of ‘shame culture’ and ‘guilt culture’ were rejected by him as being untenable.<sup>216</sup>

In an examination of Classical Athenian homicide legislation published a little over a decade after Dodds, Douglas MacDowell argued that it was very difficult to detect any concerns over pollution in Athenian homicide laws. Identifying only a single instance of any clear form of purification language in them, MacDowell argued that at least some of the laws must have been composed before pollution became part of the Athenian imagination.<sup>217</sup> The emphasis that he placed on deterrent as being the motivating factor behind the proclamation against a killer to stay away from certain public spaces and its inadequacies has already been discussed, and it is emblematic of MacDowell’s reading of the sources in which he focuses on only what is explicitly stated by them.<sup>218</sup>

A much stronger challenge to the existence of homicide pollution beliefs in Classical Athens came in Robert Parker’s *Miasma*. The monograph is a wide-ranging work that addresses pollution in many contexts, and it incorporated the theories of Mary Douglas to present an understanding of Greek pollution that challenged previous scholarship on the topic.<sup>219</sup> An entire chapter of *Miasma* was dedicated

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<sup>216</sup> He further notes that the distinction between shame and guilt cultures ultimately rests upon twentieth century assumptions about Western Christian society; Cairns (1993), 27-47.

<sup>217</sup> MacDowell (1963), 141-150. Gagarin also sees pollution beliefs as emerging in Athens after the drafting of Drako’s law on homicide; Gagarin (1981), 164-167.

<sup>218</sup> See Saunders (1965), 225.

<sup>219</sup> Parker mentions Douglas’ theories openly when he discusses birth and death pollution as deriving from their betwixt and between state. He follows her when

to examining Classical Athenian homicide pollution and in it, Parker placed a heavy emphasis on the anger of the victim directed at the next of kin and the *dikastai* as the source of homicide pollution; undermining the depiction of it as indiscriminate, contagious, and a risk to the entire community and replacing it with a strictly functionalist interpretation in which it serves only as a mechanism to motivate the victim's relatives to prosecute.<sup>220</sup>

Parker succeeded in demonstrating that pollution was not simply an indiscriminate consequence of a killing. As it was adaptable to the specific circumstances of the killing and matched closely the laws on homicide, then it expressed the disruption felt by Athenian society. Most of the remainder of Parker's arguments on homicide pollution, however, were flawed. Evidence that homicide pollution did place the entire community at risk was glossed over, ignored, or not adequately dealt with.<sup>221</sup> When citing a lack of instances in which misfortunes are

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he rejects a direct link between disgust and pollution, in rejecting the theory that purity rituals have their basis in hygiene, rejecting medical materialism and scientific reasoning, when he identifies the liminal state of the pregnant woman as the source of the danger to her, rather than her physiological condition, and when he argues that "pollution is the product of the urge for order and control"; Parker (1983), 54-57, 61.

<sup>220</sup> Parker (1983), 106-108, 110.

<sup>221</sup> The examples in the *Tetralogies* discussed above of homicide pollution as an indiscriminate threat to the community are also glossed over in Parker's summary of them, whilst Euxitheus' argument that he cannot be a killer because he did not cause ships to sink or sacrifices to fail leads to Parker speculating that the anger of the victim can be so powerful that it can carry an indiscriminate threat to a ship full of people with no link at all to the killing. This and other forms of pollution, such as that derived by kin killings, are by his own admission arbitrarily placed by him as derivative from the victim's anger; Parker (1983), 109-110. Meanwhile, the *Laws* are dismissed on the grounds that they are religiously conservative. See Harris (2015), 17-18, for many examples which contradict this.

blamed upon the presence of a polluted killer, Parker mistook misfortune pollution for the dirt pollution system that he otherwise argued for and which is broadly supported by the evidence.<sup>222</sup>

Dodds had identified a primitive horror of spilt blood as a source of pollution fears for the ancient Greek, an aspect which was heavily played down by Parker.<sup>223</sup> It has been noted earlier that one of the main ways in which later studies have built upon and criticised Douglas is on the topic of disgust. As much of Douglas' theory of pollution was focused on establishing it as the expression of a culture's concerns, as opposed to the individual expression of the primitive mind, it meant there was no place for disgust in her scheme. *Miasma* did depart somewhat from Douglas in the area of bodily emissions as though they are occasionally mentioned as a source of dirt, there is no attempt to produce a system of pollution based upon them, and when they are discussed it is often in the context of the social significance of the act which the dirt expresses, rather than as the body as a system for pollution.<sup>224</sup> Parker did, however, identify an embarrassment over bodily emissions in Greek society, and suggested that in the case of

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<sup>222</sup> Parker (1983), 129-130. Parker likely inherits here the flaw identified by Valeri in Douglas' work, in which she conflates one type of pollution system as being all types. A system of dirt pollution requires that the killer always be considered as polluted from the moment of the killing, whereas in misfortunate pollution, it is only due to an unfortunate event that a person is then regarded as polluted. Nor can misfortune pollution make the fine distinctions between offences that characterise Athenian homicide pollution. This is not to say the Athenians did not fear the consequences of the presence of a polluted killer, but that it was the risk of what it may do, rather than what it has done, which is primary.

<sup>223</sup> Dodds (1951), 154; Parker (1983), 107.

<sup>224</sup> Parker (1983), 76-77.

menstruation, the subject was so shameful that it was rarely discussed.<sup>225</sup>

The presence of blood in homicides is sufficient to trigger a disgust reaction even in societies which lack any form of pollution beliefs. In a discussion of disgust in modern homicide law, Martha Nussbaum identifies actual US cases in which the jury have been directed to consult their reactions of disgust to the crime when making a decision.<sup>226</sup> In other cases, homicides which are especially bloody or in some other way vile are noted as causing a disgust reaction in the jury.<sup>227</sup> In many ways, the disgust reaction is comparable to pollution in other societies, and disgust and societal expression can go hand-in-hand, as what the jury finds disgusting is often informed by the values of the society. For example, Nussbaum notes that the amount of disgust at the crime elicited from a jury can vary depending on the race of the defendant, but also, that among the deeds that are likely to illicit a disgust response are those which are especially bloody.<sup>228</sup> The disgust response here is affected by both the presence of blood and societal values. Whilst Parker was correct to argue that a fear of the blood of the victim cannot explain the variations in the amount of pollution that killings in different circumstances incur, it goes too far to regard it simply as the mechanical expression of a society's values. The blood and the expression are rather engaged in a dialogue. The unease at

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<sup>225</sup> Parker (1983), 101-102.

<sup>226</sup> Nussbaum (2004), 163-164.

<sup>227</sup> Nussbaum (2004), 164-165.

<sup>228</sup> Nussbaum (2004), 165.

bodily emissions, the deep reluctance to broach the topic of menstruation, and the close association of homicide and blood suggests that to present the blood of the victim merely as a mechanical symbol does not do the idea justice. Just as for Douglas to say that bodily emissions pollute because they transgress the body's boundary does not do the idea justice.

As Meigs points out, what makes the emissions polluted and/or disgusting is that they are dangerous.<sup>229</sup> Which is not to hark back to ideas of medical materialism and scientific rationalism, it is not the case that the ancient Greek feared contacting a physical infection from the emission in the manner of modern scientific understanding; rather, they are associated with decay, and, specifically in the case of homicide, the blood is associated with death.<sup>230</sup> To quote Meigs on bodily emissions: “(they are) things which are dying, separated from that which can make them live. Being actually or potentially contaminated, these emissions are feared as contaminating, as having the power to cause an ill-defined sickening.”<sup>231</sup> Valeri also identifies the polluting power of shed blood to be an expression of the violation of the social rule to not kill, but points out that for the blood to work as a symbol, it has to become material and literal enough to generate concern for bodily well-being.<sup>232</sup> So powerful is the concern that blood generates, that it is the

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<sup>229</sup> Meigs (1978), 310-312.

<sup>230</sup> Meigs (1978), 312.

<sup>231</sup> Meigs (1978), 312.

<sup>232</sup> Valeri (2000), 49.

symbol that most often characterises homicide across cultures, and the association of it with death pre-dates history.<sup>233</sup>

When these ideas, along with those of Curtis, are applied to the Classical Athenian conception of homicide pollution, it becomes clear that neither Dodds' fear of shed blood nor Parker's purely functional vehicle through which social disruption is expressed is entirely an adequate explanation. The differing amount of purification required depending on the circumstances of the killing, even extending to none needed at all, mean a fear of blood alone cannot have been the reason that blood was seen as polluting. The close ties with the corresponding legal sanctions against killings does demonstrate that homicide pollution beliefs were in line with Athenian views on killing, so it is reasonable to suppose that the expression of societal disruption created by the killing was a major factor in shaping Classical Athenian pollution belief. Consequently, it is fair to accept that Parker's view is superior to Dodds'. However, as Parker was arguing against Dodds' conception of pollution, it caused him to discount the threat that the shed blood presents. The substance is not necessarily the cause of the pollution beliefs, but where pollution beliefs are present, the concern that the substance generates forms an integral part of the imaginative expression of them due to its close association with death and the disgust response that it can generate.

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<sup>233</sup> Meyer (2005), 2; Valeri (2000), 48.



Alongside the downplaying of homicide pollution as a feature of Classical Athenian belief, Parker also turned on its head the traditional understanding of pollution beliefs emerging in post-Homeric Greece, which was fundamental to the shame-guilt schema of Dodds. Even MacDowell, with whom Parker shares an understanding on homicide pollution beliefs as being secondary and not essential to Athenian homicide law, saw the traces of homicide pollution he did identify as being a later development, not an earlier one.

Parker argued that a misleading impression had been left by the sources due to fifth century tragedy's preoccupation with kin killings which was not shared by Homeric epic.<sup>234</sup> This **was** the product of Parker's attempt to locate the function of homicide pollution, which led him to conclude that its natural setting was a society that lacked formal legal institutions.<sup>235</sup> Once the Athenian court system was established, Parker could no longer see a function for it in Athenian society. He posited that it initially underwent a temporary transformation as the anger of the victim threatening the next of kin and the *dikastai*, and by the time of the fourth century the court system had entrenched itself and homicide pollution beliefs had consequently all but disappeared.<sup>236</sup>

It is a theory which has a number of flaws.<sup>237</sup> As has been discussed already, evidence for pollution beliefs are frequently found in fourth-

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<sup>234</sup> Parker (1983), 16.

<sup>235</sup> In identifying the lack of a police force to arrest Orestes as creating the necessity for the Erinyes, Parker echoes a similar point made by Douglas. See Douglas (1975) 53-54; Parker (1983), 125.

<sup>236</sup> Parker (1983), 126.

<sup>237</sup> See also Harris (Forthcoming), 13-19.

century sources; they are found in laws, legal speeches, and philosophy, cover many different types of homicide, not just kin-killing, and many do present homicide pollution both as a contagious threat to the *polis* and not as deriving from the anger of the victim.<sup>238</sup> In addition to these, the Nuer, a tribe in South Sudan whom Parker discusses in the chapter, have a system of homicide pollution expressed as the anger of the victim's ghost which affects the kin of victim and killer until they reach a settlement.<sup>239</sup> This is precisely the sort of pollution which Parker sees as a temporary evolution whilst the court system embeds, yet it is found in a society with no formal legal institutions.<sup>240</sup>

Parker also makes a leap from 'more formal legal institutions' when discussing the appropriate setting for homicide pollution beliefs, to 'courts' when discussing Classical Athens. It is worth noting that the specific example of a more formal legal institution that Parker gives is a police force, which would have circumvented the need for the Erinyes by arresting Orestes, rather than a court. Classical Athens did have public magistrates whose responsibility was to enforce the law in a manner similar to a modern police force, but it did not have a public prosecutor who would bring a case against the accused homicide on

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<sup>238</sup> See Harris (forthcoming) for numerous examples of homicide pollution in Greek sources dating to the fourth century and later. These include a fourth century law declaring tyrannicides free from pollution, a decree by Alexander allowing exiles to return to their cities except for thieves of sacred property and homicides, as these two categories of people were polluted, and the purification of the Ten Thousand following the killing of three Colchian elders by some of the soldiers; *SEG* 12.987; *D.S.* 17.109.1, 18.8.4; *Xen. An.* 5.7.13-19, 35.

<sup>239</sup> Evans-Pritchard (1956), 294.

<sup>240</sup> Evans-Pritchard (1940), 151.

behalf of the *polis*.<sup>241</sup> For a homicide trial to come to court it required the victim's family to bring a prosecution. Even in the case of public offences, it was necessary for someone to initiate a charge and bring the defendant to court. Thus, the role played by the Erinyes was not superseded by the Classical Athenian court system. Rather, the Erinyes in the *Eumenides* take on the role of the victim's relatives under the Athenian court system, not the police.

The placement of homicide pollution beliefs to Homeric Greece is by Parker's admission speculative. It is also as problematic as his theories on Classical Athenian homicide pollution for two main reasons.<sup>242</sup> The first is that there are courts for homicide in Homeric society. The Shield of Achilles displays a trial in which two men are in dispute over the payment of blood money following a homicide.<sup>243</sup> A formal system is depicted wherein each man presents his case in a public court to a group of elders for a decision. The second is the lack of any evidence for homicide pollution in either the *Iliad* or the *Odyssey*, even though there are many occasions where it could have been mentioned had it been present in Homeric society.<sup>244</sup>

Such has been the impact of *Miasma* that the Oxford Classical Dictionary contains an entry on 'pollution, the Greek concept of', written by Parker which briefly summarises its arguments.<sup>245</sup> That there

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<sup>241</sup> See Harris (2013), 21-59, for the evidence on the policing role of Athenian public magistrates.

<sup>242</sup> Parker (1983), 130.

<sup>243</sup> Hom. *Il.* 18.497-508.

<sup>244</sup> See Harris (2015), 15-16, 28-30.

<sup>245</sup> Hornblower and Spawforth (2012), 1173.

is no comparable entry for the Roman concept of pollution demonstrates the extent to which *Miasma* helped define the topic as an area of interest. The studies of both MacDowell and Parker have proved enduring in Greek legal scholarship. They were followed by Tulin, who repeated many of *Miasma*'s arguments.<sup>246</sup> By Carawan, who saw the *Tetralogies* and *Laws* as reflective of an 'archaizing piety'.<sup>247</sup> Arnaoutoglou repeated MacDowell's erroneous assertion that the ban on entering certain places was only a deterrent, and followed Parker in asserting that pollution had little role in Athenian homicide law.<sup>248</sup> Sealey openly acknowledged a debt to Parker and Arnaoutoglou when he asserted that pollution could only be found on the stage and not in the lawcourt.<sup>249</sup> Such has been the persistence of Parker's claim that homicide pollution exists in a society without formal legal institutions and gradually evolves out in an altered form once they are introduced, that it was later repeated in a Roman context by Lennon.<sup>250</sup>

Subsequent scholars have also built upon and challenged the work of Parker. Petrovic and Petrovic convincingly argued that inner purity was not a concept that gradually entered Greek religious belief, but that it

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<sup>246</sup> Tulin (1996), 85-87.

<sup>247</sup> Carawan (1998), 197.

<sup>248</sup> Arnaoutoglou (2000), 125, 134.

<sup>249</sup> Sealey (2006), 479-481.

<sup>250</sup> "By the late Republic, the Roman legal system had developed significantly. Pollution naturally does not vanish with the emergence of law but remains for a period after its instigation, although with an altered objective, serving 'as a threat directed by the original avengers against the surrogate avengers, the jurors, and through them against the city they represented'. Much as with Greece, the situation is again one in which no evidence exists for pollution in the earlier period, whilst there is much evidence in the Late Republic; Lennon (2014), 93-94.

existed at least from the time of Hesiod, and that it possessed a moral dimension based on the belief that the gods can see into human minds.<sup>251</sup> They considered Parker's theory on the function of Classical Athenian homicide pollution 'attractive', though their concern was primarily over what pollution says about the mental state and motivations of the killer and the importance that both the laws and pollution belief placed upon it.<sup>252</sup>

Much as with MacDowell, Eck saw no evidence of pollution concerns in the Athenian homicide laws and lawcourts, preferring instead to emphasise the element of deterrent.<sup>253</sup> He argued that pollution could not make the fine distinctions between types of homicide characteristic of Athenian homicide law, and he called upon Antiph. 6.4 to argue that as an innocent man must stay away from the proscribed places then pollution cannot be the concern as he is not polluted.<sup>254</sup> As has been noted, it is in fact this doubt over whether the accused is innocent or guilty which results in this temporary procedure until a trial can be held. A convicted and therefore polluted killer is not simply banned from entering these places, he is removed from the *polis* altogether.

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<sup>251</sup> Petrovic and Petrovic (2016).

<sup>252</sup> Petrovic and Petrovic (2016), 153-165.

<sup>253</sup> Eck (2012), 227-231, 309-310, 385.

<sup>254</sup> Eck (2012), 255, 306-307, 386. It has already been noted that Demosthenes considered the lawful killer to be ritually pure, which is in line with Athenian homicide law that imposed no punishment on the lawful killer. For the importance of the mental state and motivations of the killer with regards to the pollution the act incurs see Harris (2010), 133-34; and Petrovic and Petrovic (2016), 132-182.

Whilst Eck accepted that there was no pollution for homicide to be found in Homer, he instead argued that there was a much milder pollution caused by killings in warfare.<sup>255</sup> Much is made of the use of *thambos*, *Ares miaphonos*, and four passages in the Iliad, not all of which are convincing, but in the case of Hektor at least, there is certainly a purification required following battle before he can approach the divine.<sup>256</sup> This mild pollution creates a stain on the Homeric hero, and Eck further argued that having started out in the sphere of warfare, this stain will have gradually crossed into the private sphere in the form of pollution for homicide.

Eck also reintroduced the concept of guilt as fundamental to the existence of homicide pollution beliefs.<sup>257</sup> Like Dodds, he saw the lack of guilt felt by the Homeric hero as being the reason that homicide pollution cannot be found in Homer, though he side-stepped some of the problems of Dodds' scheme by also arguing that Homeric Greek was not a shame culture. The argument largely rests on an assumption by Eck that guilt is a requirement for defilement, which may or not be true but is not proven. It is also at least called into question by the very clear external manifestation of Classical Athenian homicide pollution in its drive to motivate the next of kin and *dikastai* to prosecute, to keep the potentially polluted killer away from public spaces, to remove the polluted killer from the community altogether, and to tie the degree of

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<sup>255</sup> Eck is opposed to Parker and other Greek scholars who see no pollution as a result of killing in warfare; Eck (2012), 55.

<sup>256</sup> Eck (2012), 106-116.

<sup>257</sup> Eck (2012), 123-129.

pollution to the communal disapproval of the circumstances of the killing. As Irene Salvo points out, homicide pollution works alongside the laws on homicide to control the public order.<sup>258</sup>

The absence of specific mentions of homicides as among the polluted persons excluded from temples was also addressed by Salvo. She argued that homicide purification rites were part of a Panhellenic ritual norm, in which a ban on accused and convicted homicides, such as the one in Classical Athens, would have prevented them from entering sacred spaces.<sup>259</sup>

An alternate source of homicide pollution other than one which derived directly from the act itself was proposed by Bendlin.<sup>260</sup> He accepted that the proclamation made against a killer that he must stay away from certain public spaces was due to concerns over homicide pollution but argued that it was this act which created the homicide pollution, and that it did not exist before the proclamation was made.<sup>261</sup> Ironically, this caused him to also downplay the evidence of the *Tetralogies* and the *Laws* for which it is a prominent feature of both, and to also

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<sup>258</sup> Salvo (2012a), 150-152.

<sup>259</sup> Salvo (2012b), 319-323.

<sup>260</sup> Bendlin also took issue with Douglas' structuralist approach and the dichotomy of pure and polluted, with purity regulations maintaining the social order by presenting those areas which fall outside of the social classifications as polluted. Rather than seeing pollution and purity as opposites, Bendlin argued that for each, their opposite is 'normalcy', and he consequently disregarded the application of the concept of 'taboo' to Greek notions of purity and pollution. Whilst Bendlin does acknowledge that structuralist interpretations have value in some instances, he cites other instances of misfortune pollution, such as the purification of Delos by the Athenians in response to an outbreak of plague; Bendlin (2010), 178-189. For a discussion of the problems with Bendlin's views on pollution and purity see Petrovic and Petrovic (2016), 23.

<sup>261</sup> Bendlin (2010), 185-186.

emphasise the perceived lack of reference to homicide pollution in actual Athenian legal speeches.<sup>262</sup>

This is a theory which is fundamentally flawed. The proclamation could not bring the pollution into existence because at this point no verdict had been rendered and the accused could very well be either innocent or have carried out a lawful killing. In either case this would mean that the killer was never polluted regardless of any proclamation. The purpose of the ban in these circumstances was purely one of precaution, as opposed to the accused killer becoming polluted upon the proclamation and then ceasing to be upon the verdict. As support for his argument, Bendlin cited a similar proclamation made by Oedipus against the unknown killer of Laius in Sophocles' *Oedipus Tyrannus*, despite the fact that the motivation for finding Laius' killer is the *miasma* which is already afflicting Thebes, something which Bendlin himself had pointed out.<sup>263</sup>

Against the argument that Classical Athenian homicide pollution is a relic from an earlier time, Harris argued that the evidence fits exactly into its context.<sup>264</sup> Classical Athenian homicide legislation, with its many different courts, lengthy procedures, and ban on the accused entering public spaces, demonstrates the utmost seriousness with which the community regarded the offence whilst simultaneously recognising it as a private wrong to the victim and his family. Homicide pollution

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<sup>262</sup> Bendlin (2010), 185.

<sup>263</sup> Bendlin (2010), 184, 186.

<sup>264</sup> Harris (2015), 11-35.



existed alongside this as the expression of the community's views about homicide, and placed pressure on the community as a whole to deal with the offence. As the obligation to prosecute a homicide fell to the next of kin, homicide pollution served to encourage the victim's kin and the courts to bring a conviction against the killer.<sup>265</sup>

### The Hebrew Bible

Evidence for homicide pollution belief is also found in the Hebrew Bible, and along with Classical Athens, these two societies provide some of the fullest expressions of a doctrine of homicide pollution found in the ancient world. Although the Hebrew Bible almost certainly contains material drawn from across a period of several centuries, the composition of much of it is roughly contemporary with the Archaic and Classical periods, and thus roughly contemporary with the Athenian evidence. Similarly, whilst Hebrew society did not have as sophisticated a legal system as the Athenians, nor was it primitive either.

This makes the Hebrew Bible a valuable point of comparison for examining the function of homicide pollution in Classical Athens, as the conclusions which are drawn about it should hold up for both societies. For example, if Parker is correct about the appropriate context for homicide pollution, then what should be found in the Hebrew Bible is a legal system lacking in any formal institutions, and

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<sup>265</sup> Harris (2015), 27-28.

thus requiring homicide pollution to stand in their place so that the offence can be adequately dealt with. If pollution is found with regards to killing in warfare, then it would lend credence to Eck's argument that it can be found in Greece and could even be the original source of what later became homicide pollution belief. If the degree of pollution is tied to the circumstances of the killing, then it would suggest that pollution beliefs are capable of making the kind of fine distinctions found in homicide law.

As discussed in the introduction, using the Hebrew Bible to reconstruct either homicide legislation or homicide pollution beliefs in ancient Israel and Judah is more problematic than using the Classical Athenian sources for Classical Athens. The exact dates and authorship of the texts are unknown, and the extent to which they reflected actual practice and belief is difficult to determine. However, sufficient consistency is found across the homicide material that a coherent set of Hebrew homicide legislation can be found which can at the least be considered as belonging to a society reflected by the Hebrew Bible. The best evidence for Hebrew homicide pollution beliefs is found in two places. The first is in Numbers, and is usually attributed to the Priestly source, and the second is in Deuteronomy. These two sources do not agree completely on how pollution works, but they do have more than sufficient overlap with each other, and with other material on homicide in the Hebrew Bible, to be able to speak of a Hebrew homicide pollution belief system.

As with the section on Classical Athens, this section will begin with a survey of homicide legislation in the Hebrew Bible, as this provides the same important context for the imaginative expression of Hebrew homicide pollution belief. This is followed by a survey of the evidence for homicide pollution in the Hebrew Bible. No study comparable to *Miasma* exists for Hebrew pollution beliefs, and it is not the intention of this section to challenge prevailing scholarly opinion on the topic; rather, the focus of the discussion is a comparative one. A reasonably comprehensive survey of homicide legislation and homicide pollution in the Hebrew Bible is presented so as to allow for an adequate comparison with the Classical Athenian evidence.

#### Homicide legislation in the Hebrew Bible

Homicide legislation is presented both directly and indirectly in the Hebrew Bible. Homicide is prohibited in the Decalogue, and passages in Exodus, Numbers, and Deuteronomy explicitly lay out laws which both define the offence and prescribe the punishments for it. These are complemented by a number of narrative passages that recount incidents which involve homicides. Broadly speaking, the Hebrew Bible divides homicides into those which are intentional and those which are involuntary. For the former the penalty is death, and the latter the penalty is effectively exile. Two other elements can further be found in Hebrew homicide legislation. The first is the figure of the *go'el haddam*, whose responsibility it may have been to carry out the

execution of the killer, though it may just have been the case that their role required them to bring the killer to trial. The second is the establishment of cities of refuge to which a killer could flee to in order to escape the *go'el haddam* and make their case for the killing to have been unintentional. If successful, they would be protected from the *go'el haddam* as long as they remained inside the city of refuge.

The first account of a homicide in the Hebrew Bible is also one of the most famous homicides of all. At Gen. 4, Cain, the eldest son of the first man and woman, kills his younger brother, Abel, in a fit of jealousy after God gives more regard to Abel's sacrifice than to Cain's. As an insight into homicide legislation the passage has little to offer. It is a legendary account in which there is no formal legal context within which the offence can be addressed, though that it is a serious offence seems taken for granted. The punishment for Cain is exile, which is out of keeping with the homicide legislation that follows later in the Hebrew Bible in which death would be the appropriate punishment.<sup>266</sup> God even tries to ensure that Cain is not killed by cursing anyone who does kill him with a sevenfold vengeance. Another famous homicide occurs early in Exodus. Here, Moses kills an Egyptian that he sees beating a Hebrew.<sup>267</sup> When Pharaoh hears of the murder he seeks to kill Moses as retribution for the crime, and Moses in turn flees Egypt

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<sup>266</sup> Cain complains that God has driven him from the land and away from God's face, which harkens to Gen. 3.24 in which Adam and Eve are driven from the garden. Rather than reflecting any actual legal practice, when taken with the earlier passage it seems as if being driven away by God is a punishment for sin. For parallels between the punishments of Adam and Eve and of Cain, see Westermann, (1984), 285-286, 303; Wenham (1987), 100, 117.

<sup>267</sup> Exod. 2.11-12.

for an effective exile in Midian.<sup>268</sup> Much as with Cain and Abel, it is difficult to read much into this legendary account. Execution is here presented as the punishment, though by fleeing from Egypt and entering voluntary exile, it seems as if this constitutes a sufficient punishment for Moses as there is no sense that he is pursued. This voluntary exile is much more in keeping with the situation found in Athens than in the homicide legislation found in the Hebrew Bible.

After these two legendary accounts, the evidence for homicide law becomes fuller, and Exod. 21-22 contains the first of three sets of homicide legislation found in the Pentateuch:

21.12-14: Whoever strikes a person mortally shall be put to death. If it was not pre-meditated, but came about by an act of God, then I will appoint for you a place to which the killer may flee. But if someone wilfully attacks and kills another by treachery you shall take the killer from my altar for execution.

21.20-21: When a slave-owner strikes a male or female slave with a rod and the slave dies immediately, the owner shall be punished. But if a slave survives for a day or two, there is no punishment, for the slave is the owner's property.

21.28-32: When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall not be liable. If the ox has been accustomed to gore in the past, and its owner has been warned but has not restrained it, and it kills a man or

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<sup>268</sup> Exod. 2.15.

woman, the ox shall be stoned and its owner shall also be put to death. If a ransom is imposed on the owner, then the owner shall pay whatever is imposed for the redemption of the victim's life. If it gores a boy or girl, the owner shall be dealt with according to this same rule. If the ox gores a male or female slave, the owner shall pay to the slave-owner thirty shekels of silver, and the ox shall be stoned.

22.2-3: If a thief is found breaking in, and is beaten to death, no blood-guilt is incurred; but if it happens after sunrise, blood-guilt is incurred.

These passages are contained in what is usually termed the Covenant Code, consisting of Exod. 20.22-23.33. It was identified by Wellhausen as the oldest of the law codes in the Hebrew Bible, and by Noth as an originally independent law code that was inserted into Exodus.<sup>269</sup> The laws on homicide are spread out amongst the code, and some do not deal with homicide directly, but taken together they allow for a set of principles from which homicide cases can be judged. The first of the laws does deal directly with homicide, and just as found in Athens, this law draws a distinction between intentional homicide and involuntary homicide. If the killing is intentional, then the killer is to be put to death. If the killing was not intentional, then a place is appointed to which the killer can flee. The location of the appointed place is not specified, but the final part of the law suggests that the place is an altar.

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<sup>269</sup> Wellhausen (1885) 29-30, 83-89; Noth (1962), 173. Unsurprisingly, this section has been subject to diverse theories as to its provenance and composition. For a summary of scholarship, see Van Seters (2003), 8-46.

If that is the case, then what happens after the involuntary killer reaches the altar is not discussed. The altar did not provide the intentional killer with any refuge, however, as the fate of Joab at 1 Kgs. 28-34 shows.

The remaining laws which deal with one person killing another add some layers of granularity to homicide law. Justifiable homicide is found in the passage discussing the thief who breaks into another person's home, and the allowance for lawfully killing a thief caught before sunrise has a parallel in an Athenian source in Dem. 24.113. Exactly why the killing is lawful if it occurs at night is not discussed, though presumably it is either because a person found in another's home during the night could reasonably be presumed a thief, whilst during the day they could not, or because the home owner would have help he could call on during the day, but not at night, or perhaps both.<sup>270</sup> Regardless of the exact reason, this law lays down the same principle

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<sup>270</sup> Barmash suggests that the reason is because the homeowner could not be sure whether the intruder intended to kill him if he entered the home at night, whereas during the day the homeowner could be sure the intruder was just a thief; Barmash (2005), 124. If this is true, then the killing is justifiable only if is self-defence, and never if it is in defence of property. A comparison with the Athenian evidence is helpful in this regard, as in Dem. 24.133, a thief caught during the day stealing more than fifty drachmas is liable to be handed over to the Eleven, whereas a thief caught during the night stealing any amount can be lawfully killed. There is no suggestion here that the killing at night is lawful because the person who catches the thief cannot be sure of the thief's intentions. In fact, even if handed over to the Eleven, the daytime thief can still be liable to the death penalty. The difference between them is that the daytime thief needs to be handed over to a magistrate for punishment, whilst the night-time thief can be dealt with on the spot. The defence of property is at stake in either case and the allowance for justifiable homicide likely reflects the practicalities of self-help against a person caught during the night.

as found in Athens, that in certain circumstances it is entirely lawful to kill another.<sup>271</sup>

Negligent homicide is found in the law on the goring ox. The owner of the ox is not held liable for the killing unless the ox had been accustomed to gore in the past. If it had been, then the owner is culpable for not preventing it. Whilst execution is given as the sentence in this case, unlike homicide derived from striking another, a ransom payment is offered as an alternative penalty. As with the thief, whilst this law deals with one specific instance of negligible homicide, a general principle could presumably be drawn from it. The remaining passage deals with the killing of a slave by its owner who has struck the slave with a rod. Here a distinction is drawn based on whether the slave dies immediately. If the slave dies, the owner is punished. In this case it is presumably because an immediate death means the owner was too severe in his use of the rod. Unlike in the other instances of homicide legislation in the Covenant Code, the punishment here is not specified, and nor is it clear who would bring the prosecution on behalf of the deceased slave. The right to prosecute the killer of a murdered slave in Athens would fall to the slave's owner, and both Antiphon and Plato

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<sup>271</sup> No law exists which explicitly states killing unwittingly in battle is justifiable homicide, as found in Dem. 23.53, but it can be inferred from the death of Uriah the Hittite whose death is staged by David to appear as if it occurred naturally in battle; 2 Sam. 11.14-21. For a comparison of legislation on catching an adulterer or *moichos* in the act and killing them, see the case following case study.



suggest that if a slave was killed by their owner, there would be no-one to bring a prosecution on their behalf.<sup>272</sup>

The second set of homicide legislation in the Pentateuch is found at Num. 35. This legislation follows a section in which the Israelites are informed as to how Canaan will be divided between them once they have conquered it. As part of this, six cities are to be designated as cities of refuge to which a person who kills without intent can flee.<sup>273</sup> As the killer can only legitimately claim refuge at one of these cities if the killing was unintentional, then Num. 35 seeks to define what is considered intentional and what is considered unintentional:

35.16-18: But anyone who strikes another with an iron object, and death ensues, is a murderer; the murderer shall be put to death. Or anyone who strikes another with a stone in hand that could cause death, and death ensues, is a murderer; the murderer shall be put to death.

35.20-21: Likewise, if someone pushes another from hatred, or hurls something at another, lying in wait, and death ensues, then the one who struck the blow shall be put to death; that person is a murderer;

35.22-25: But if someone pushes another without enmity, or hurls any object without lying in wait, or while handling any stone that could cause death, unintentionally drops it on another and death ensues, though they were not enemies, and no harm was intended, then the

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<sup>272</sup> Antiph. 6.4; Plato *Grg.* 483b. In the *Laws*, the only punishment laid down for the killing of one's own slave is a purification ritual, which is echoed in Antiph. 6.4 also; Plato *Laws* 868a.

<sup>273</sup> Num. 35.6-11.

congregation shall judge between the slayer and the avenger of blood, in accordance with these ordinances; and the congregation shall rescue the slayer from the avenger of blood.

Most of the situations found in the first two passages are then paralleled in the third, so as to provide guidance over which circumstances should be considered intentional and which should not. Unlike with Exodus, there is no effort to distinguish and deal with other circumstances. These passages expand upon Exod. 21.12-14 in describing exactly what constitutes intentional and involuntary homicide, and to where the killer can flee to claim refuge. Num. 35 goes on to discuss two procedural aspects of homicide law. The first is that the killer is only to be convicted on the testimony of two or more witnesses as no-one can be put to death on the testimony of a single witness, and the second that the death penalty cannot be ransomed off by a payment, but the killer must be put to death.<sup>274</sup> Whilst the first of these differs from Athenian practice due to the way the court system operated in Athens, the second does have a parallel in Athens. In Dem. 58.28-29, Theocrines is condemned for accepting a bribe from his brother's killers so as not to bring a prosecution against them.

The third collection of homicide legislation is found in Deut. 19:

19.5: Suppose someone goes into the forest with another to cut wood, and when one of them swings the axe to cut down a tree, the head slips

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<sup>274</sup> Num. 35.30-32.

from the handle and strikes the other person who then dies; the killer may flee to one of these cities and live.

19.11-12: But if someone at enmity with another lies in wait and attacks and takes the life of that person, and flees into one of these cities, then the elders of the killer's city shall send to have the culprit taken from there and handed over to the avenger of blood to be put to death.

The context in which the laws are introduced is again a discussion on the establishment of cities of refuge. This legislation is not as detailed as in those Num. 35, but they cover the same territory in attempting to establish whether a killing should be considered as intentional or involuntary homicide. Deut. 19.5 is immediately preceded by an explanation that the cities of refuge are a place for the unintentional killer to flee. It is not clear whether 19.5 is an example of the person who kills another person unintentionally when there had been no enmity between them before, or whether it is a separate example of an accidental death as opposed to involuntary homicide.<sup>275</sup> If 19.4 and 19.5 are drawing a distinction between involuntary homicide and accidental death then in both cases the killer would have to go into exile, though even if they are not, it would seem that the key factor in determining whether a killing is involuntary homicide is simply that death occurs where it was not intended by the killer. Whether the killer was negligent or not does not matter.

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<sup>275</sup> Lundbom (2013), 567.

Negligent homicide can be seen, however, at Deut. 22.8, in which the person who builds a new house is instructed to build a parapet around it lest someone fall from it, but outside of this and the example of the goring ox, the Hebrew homicide legislation is entirely focused upon the act of killing being one in which the killer is physically responsible for the death of the victim. Neither planning nor attempted homicide are covered by it. The more sophisticated understanding of the offence in Athens, in which prosecutions could be brought for these offences as in the case of Agoratus, is not found in the Hebrew Bible.

In addition to the substantive element of homicide legislation, the Hebrew Bible discusses two main procedural aspects. One is the cities of refuge, which have been touched upon in the preceding section, and the other is the *go'el haddam*. The title of *go'el haddam*, meaning the redeemer, restorer, or avenger of blood, was given to the person responsible for punishing the killer. Following the list of killings which are to be regarded as murder, Num. 35.19 states that the *go'el haddam* has the responsibility of putting the killer to death and is the person who must execute the sentence when they meet the killer. Deut. 19.6 makes mention of the *go'el haddam* in the context of being responsible for pursuing and killing the murderer. The exact identification of who is the *go'el haddam* is not given, and some scholars have argued that it is the title of a magistrate or an official.<sup>276</sup> Where it is used elsewhere in

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<sup>276</sup> Sulzberger sees the *go'el haddam* as an official magistrate introduced by the Deuteronomic reforms, Phillips argues that the position was filled by a representative of the elders from the killer's city, who would travel to the killer's place of refuge and carry out the sentence if found guilty; Sulzberger (1915), 55-56; Phillips (1970), 103-104.

the Hebrew Bible, *go 'el* on its own refers to a next of kin. It appears at Lev. 25.25, where the *go 'el* is responsible for redeeming property sold by a kinsman who has fallen into financial difficulty, at Num. 3.8 where they are the next of kin of a wronged party to whom a restitution is made for a wrong committed against a person, and several times in Ruth it is used to refer to a next of kin with the obligation to marry a relative's widow.<sup>277</sup> In all cases the sense is of a familial obligation on the part of the *go 'el*, and Lev. 25.48-49 suggests that the right would belong to the brother in the first instance and then progress from there to the uncle, then the uncle's son, and ultimately to anyone who is related to them.

For the *go 'el haddam* in particular, at 2 Sam. 14.7-11 there is a strong hint that it is a kinsman. In this passage, David is approached by the mother of two sons who fought each other in a field, with the result that one delivered a killing blow to the other. The whole family subsequently demanded that the surviving son be handed over to them by the mother, so they could kill him for his crime. The incident did not actually occur, and the story was fabricated to persuade David to recall Absalom from banishment, but for the story to have any force it likely reflects actual practice.<sup>278</sup> *Go 'el haddam* is used by the mother

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<sup>277</sup> Ruth 3.9-4.6.

<sup>278</sup> In the course of this narrative, which takes place in 2 Sam. 23-29, no attempt is made to subject Absalom to a *go 'el haddam*, the right of which may well have been David's, as the father of the victim. As the murder was committed to avenge the rape of his sister, Absalom may have been carrying out a lawful killing. In Gen. 38, Judah is able to order the execution of Tamar for falling pregnant to another man whilst married to his son. This story is set in the patriarchal period, and Genesis betrays no concept of a developed legal system within which Judah could operate, so the comparison may not be apt.

in this passage in the context of the family's desire to kill the son to avenge his brother's death, and there is no sense of any officials or magistrates being involved. Given the usual use of *go'el* as a next of kin with an obligation to another family member, and the 2 Samuel passage, it seems very likely that in the case of a homicide, Hebrew law envisaged the *go'el hadaam* as the victim's next of kin.<sup>279</sup> This would make Hebrew homicide legislation identical to Classical Athenian homicide legislation in a fundamental procedural aspect. Just as in Athens, the next of kin was obliged to bring a prosecution, and whilst Hebrew legislation lacks the distinction between public and private cases found in Athenian law, the title of *go'el haddam* indicates that the reason for this was essentially the same. The offence was one against the victim, and in the absence of the ability of the victim to bring their own prosecution their next of kin stood in their place.

Exactly how the obligation of *go'el haddam* devolved down the family line is unclear. In 2 Sam. 14, the entire family is presented as collectively seeking retribution, with no individual identified as having responsibility. There is evidence for the obligation of *go'el* falling on the nearest kin first. Although Boaz is Ruth's *go'el*, a closer male relative exists who must first repudiate his right to buy Naomi's field and marry Ruth before Boaz can exercise his own right as the next closest *go'el*. Prosecution speeches for homicide cases in Classical Athens tend to be from a close male relative to the deceased. Antiphon

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<sup>279</sup> Levine (2000), 554; Lundbom (2013), 568.

1, 3, and 6 are given by a son, father, and brother respectively, whilst Lysias brings a prosecution for the killing of his own brother.<sup>280</sup> It is likely to be the case that Hebrew homicide legislation envisaged the right of *go'el haddam* as belonging to the closest male relatives in the first instance, and devolving down the line in a similar way to that found in Ruth; though as Barmash has pointed out, given that the role may have involved pursuing and possibly executing the killer, then it may not always have been practical to follow a strict hierarchy of obligation, and so it could just have been the collective responsibility of the family group as suggested by 2 Sam. 14.<sup>281</sup>

The distinction between intentional and involuntary homicide was to determine whether a killer was able to claim asylum. As noted, Exodus does not specify a place to which the killer may flee, though the implication there is that it was an altar; whilst Numbers, Deuteronomy, and Joshua all list cities in which a killer may flee if he wishes to claim the killing was involuntary.<sup>282</sup> In Numbers and Joshua, there are six cities given, three in Canaan and three across the Jordan. Deuteronomy only mentions three, but God tells the Israelites that if he enlarges their territory then they are to add three more cities.<sup>283</sup> It is difficult to know for certain whether these asylum cities ever existed, or whether they were a literary creation of the Hebrew Bible. Wellhausen argued for the primacy of the Covenant Code and its homicide laws over

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<sup>280</sup> Lysias 12.

<sup>281</sup> Barmash (2005), 52.

<sup>282</sup> Num. 35.13-15; Deut. 19.2-3; Josh. 20.1-6.

<sup>283</sup> Deut. 19.8-10.

Deuteronomy, and for sanctuary at an altar as the original place of asylum. As the centralising agenda of Deuteronomy left no place for local altars, these sites of asylum would have been lost; therefore, Deuteronomy recast the Covenant Code material to replace them with the cities of refuge, and in turn it was followed by Numbers.<sup>284</sup>

The schema of a transition of asylum from altars to cities was subsequently accepted by many scholars, though some attempted to push the date back from Deuteronomy to the period of David and Solomon.<sup>285</sup> The lack of a specific place of asylum given in Exodus, the impracticality of the altar as a permanent place of asylum, and evidence of both systems existing side-by-side in other parts of the ancient Near East, led some others to argue that altar asylum and the cities of refuge must have been independent from each other, and did not evolve from one into the other.<sup>286</sup> Greenberg argued that the cities replicated the function of a punishment of exile, as actual exile was not possible and is never given as a punishment in the Hebrew Bible as it would involve being cut off from God.<sup>287</sup> Most recently, Barmash challenged the schema by arguing against any dependence of Deut. 19.1-13 on the Covenant Code, and against the association of the place specified by Exod. 21.13 with the altar in the next passage.<sup>288</sup> Barmash

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<sup>284</sup> Wellhausen (1885), 33, 150.

<sup>285</sup> de Vaux (1961), 162-163; Löhr (1930), 35; McKeating (1975), 64-66; Milgrom (1989), 506-507.

<sup>286</sup> Greenberg (1959), 126; Weinfeld (1995), 124.

<sup>287</sup> Greenberg also gives primacy to Numbers over D. in dating the cities to an early age of Israel; Greenberg (1959), 128, 131-132. Similarly, Van Seters argues for the primacy of D. over the Covenant Code; Van Seters (2003), 106-108.

<sup>288</sup> Barmash (2005), 71-93.



rejected the concept of any altar asylum for homicide, and consequently there could have been no development from altar to the cities of asylum as the place of refuge.<sup>289</sup> The dependency of Deut 19.1-13 on the Covenant Code and the location of the asylum at Exod. 21.13 as the altar was then subsequently restated by Stackert in opposition to Barmash.<sup>290</sup>

Although the historical existence of the cities of refuge may have been a concern, the question of whether the cities developed from altars or not is ultimately a literary question; one which depends upon the reading of the respective texts, and it does not help to establish whether the cities ever actually existed as places of refuge. In an attempt to locate support for the existence of cities of refuge, Weinfeld drew upon a survey of temple cities in the ancient Near East and Greece, and he argued that these sites presented ample historical parallels with the cities of refuge.<sup>291</sup> These temple cities offered protection to the people who resided either in them or in the temples within them, though the specific rights varied from place to place, and it is only in the Hebrew Bible that asylum is given to the involuntary killer.<sup>292</sup> Conversely, Westbrook and Wells saw the cities as a unique institution not found anywhere outside of the Hebrew Bible, and the problem of the

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<sup>289</sup> Barmash (2005), 72-73.

<sup>290</sup> Stackert (2006), 23-49.

<sup>291</sup> Weinfeld (1995), 97-132.

<sup>292</sup> Weinfeld (1995), 122.

involuntary killer is highlighted as one not paralleled in any ancient Near Eastern source.<sup>293</sup>

The question of whether cities of refuge evolved from altar asylum is ultimately not one which bears too greatly on the historical existence of the cities, though if the concept was developed by D. as a consequence of centralising the cult, which resulted in the removal of all but one of the altars, then this could mean they were just a literary creation of D. For the reasons cited by Greenberg and Weinfeld, there is no compelling reason to assume that city and altar refuge would not have existed side-by-side prior to any centralising agenda by D., and whilst the temple cities surveyed by Weinfeld do not provide an exact parallel, they at least establish the principle that a city could serve as a place of asylum. The number of cities may suggest a literary dependence between Numbers, Deuteronomy, and Joshua, more than the historical existence of six specific cities as places of asylum, but the principle of a city of refuge as a place of asylum for a killer, especially in response to the role of the *go'el haddam*, is not problematic, as *go'el haddam* and the laws relating to accidental killing presuppose a permanent place of residence that the killer could flee to and remain safe. If this was not an altar and living out an extended period of time at an altar would seem problematic, then a specified set of cities would have been an appropriate place of refuge.

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<sup>293</sup> Westbrook and Wells (2009), 75. It should be noted that Westbrook and Wells are not engaging with Weinfeld's argument, but simply state as fact that they are not found elsewhere.

In all of the homicide legislation in the Hebrew Bible, the assumption is that the identity of the killer is known, and that only the circumstances of the killing are at stake. No guidance is given on procedure in the instance of an accused killer claiming their innocence. The rare instance of lawful killing cited in Exod. 22.2-3 seems to require only that the killing took place at night and in the killer's home, with the likelihood being that the presence of the intruder at night is itself sufficient evidence of guilt. It may be that a trial procedure could be required if the facts of a lawful killing, or the innocence of the accused were at stake, but the homicide legislation in the Hebrew Bible does not concern itself with these instances if that was the case. A trial procedure is laid out when the defence is that the killing was involuntary, though two slightly different versions are given. In Deut. 19.12, an intentional killer who reaches a city of refuge is summoned by the elders of his city to be handed over to the *go'el haddam*. This passage assumes the killing was intentional, and that these elders have determined this. In Josh. 20.4-6, a killer who flees to the city of refuge makes his case to the elders of that city, who will take him in and protect him from the *go'el haddam* until a trial is held before the congregation to determine whether the killing was intentional.<sup>294</sup> A trial before the congregation is also mentioned at Num. 35.12. If the defence

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<sup>294</sup> The term 'congregation' has a broad application which can refer to the entirety of the Israelite nation, adult males, or tribal leaders. The latter would seem most appropriate here; Milgrom (1978), 70.

is accepted, then the killer remains in the city of refuge either until their death, or until the death of the high priest.<sup>295</sup>

Unlike in an Athenian homicide case, in which a homicide prosecution could be brought without a single witness, Deut. 19.15 lays down the principle that a single witness is not sufficient to convict a person of any crime, but that two or three witnesses are required.<sup>296</sup> Num. 35.30 cites this procedural requirement specifically in the instance of homicide. Num. 35.31-32 builds on this by prohibiting the ransoming of a homicide conviction via a payment in lieu of sentence. This is at odds with the presentation of the *go'el haddam* as one who may catch and slay the killer with impunity, even the involuntary killer if they can catch him before he reaches a city of refuge. It raises the question as to whether a trial procedure would in fact have been necessary before the *go'el haddam* would be allowed to carry out the sentence. It may even be the case that the *go'el haddam* was primarily responsible for ensuring that the accused killer came to trial, much as in Athens, at which point the witness testimony would become relevant.

One area which may have helped the elders or the congregation to determine whether the killing was intentional is the presence of any existing enmity between the parties. This is identified as a key distinguishing feature of intentional and involuntary homicide at Num.

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<sup>295</sup> Num. 35.28; Josh. 20.6.

<sup>296</sup> Antiph. 1. It should be noted that the prosecutor here had a case lacking in evidence, and in the absence of witness testimony could well have failed to secure a conviction. What is clear, though, is that testimony from multiple witnesses could not have been a requirement, else the case would never have been brought at all.

35.21 and 35.22, and at Deut. 19.4 and 19.11. The method of killing is another way of distinguishing intentional and involuntary homicide in Num. 35.16-23, where striking a person with an object made of wood, stone, or iron, or whilst unarmed, and which results in the death of the victim of the strike, is considered as intentional homicide, whilst pushing the victim or dropping something on him is considered involuntary. One final procedural element is found in Deut. 21.1-9, which legislates for the instance in which a body is found but the killer is not known. The elders of the town nearest to where the body was found are to take a heifer that has never been worked to a wadi with running water, and there break the neck of the heifer whilst priests pronounce blessings and the elders wash their hands and proclaim that they did not shed blood nor were witness to it. This ritual has a clear comparison with the trial of the unknown killer at the Prytaneion. Whilst in the case of Deuteronomy, the ritual of the heifer was designed to purge the blood-guilt from a community who could otherwise not do so, in Athens it was bound up with homicides caused by animals and inanimate objects in cases in which the death of a person could not result in a regular defendant being placed on trial. Whilst there is no overt sense given that convicting an unknown killer *in absentia* was related to removing the polluting threat the killer's presence could pose to the *polis*, given its otherwise useless purpose, it is likely that it served a similar function to the ritual of the heifer in an Athenian context.

The comparison of the heifer ritual with cases heard at the Prytaneion serves as something of a microcosm for a broader comparison between

homicide legislation in Classical Athens and in the Hebrew Bible. Whilst these two procedures differed, their goals were ultimately the same, and in the main, differences in their homicide legislation also tended to be procedural rather than substantive. Both societies differentiated between intentional homicide, which was punishable by execution, involuntary homicide, which was punishable by exile, and lawful homicide, which was not an offence. Although exile was a punishment in each society, the way it was implemented differed due to the differing circumstances of each. In Athens, the killer was required to leave Attica to remove themselves completely from the community, whereas in the Hebrew Bible they were required to reside in a city of refuge so that they could remain in the land.

This had implications for whether voluntary exile could be chosen by a person accused of homicide. The defendant in an Athenian homicide trial did have the option of voluntarily going into exile prior to the rendering of the verdict, but this was not an option in the Hebrew Bible. As exile removed the killer from the community in Athens but did not remove the killer from the midst of the people or the land in the Hebrew Bible, then allowing voluntary exile would have risked allowing an intentional homicide to remain within the community, even if confined to a city of refuge. An Athenian in exile could return if the victim's family permitted it, whilst Numbers allows return from a city of refuge only on the death of the high priest, and Deuteronomy makes no allowance at all for a return.

The procedure for bringing a homicide case to trial was a lot more sophisticated in Athens, with a greater degree of granularity in type of homicide, and it would likely take a lot longer to come to trial. The substance of Athenian homicide law was also broader than that found in the Hebrew Bible, as the legislation in the latter always envisaged the killer physically carrying out the act, and it did not legislate for planning a homicide nor for attempted homicide. In both Classical Athens and the Hebrew Bible, the responsibility for prosecuting the homicide fell to the next of kin of the victim, and this devolved down the familial line. The state in Classical Athens had control over the punishment of homicide, with the next of kin's role restricted to bringing the case to trial and prosecuting at the trial. The Athenians eschewed their usual practice of leaving the verdict in the hands of randomly selected *dikastai*, and utilised differing judicial panels depending on which of the five homicide courts heard the case, which was closer to the system of rendering verdicts through elders found in the Hebrew Bible, albeit the method for selecting the panels was not based on age.<sup>297</sup> Self-help was allowed for in the Hebrew Bible with permission granted to the *go'el haddam* to execute the killer, even if it meant executing an involuntary homicide before they could reach a city of refuge. If the killer did dispute the killing was intentional, and they

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<sup>297</sup> Gagarin has argued that the largely administrative role of the *basileus* in Classical Athenian homicide trials represents the culmination of a gradual diminishing of the power of the office in this respect. In earlier periods, the *basileus* would have held the power to judge the trials, either alone or supported by a group of elders. If this was the case then Archaic Athens would have had a judicial structure for judging homicide trials even closer to the Israelite model, although this view is largely speculative; Gagarin (2000), 569-579.

reached a city of refuge, then they were granted the right to a trial, and as both Numbers and Deuteronomy mandate that no-one should be executed for murder unless a conviction was secured on the basis of at least two witnesses, then it may be the case that the accused always had the right to a trial, with the role of the *go'el haddam* reduced to ensuring that the trial occurred, which would bring it much closer to the Athenian system, though it was perhaps the case that executing the sentence fell to the *go'el haddam* if a guilty verdict was rendered.

#### Homicide Pollution in the Hebrew Bible

The material on homicide pollution in the Hebrew Bible is not as full as that found in Classical Athens, and extrapolating an understanding of Hebrew pollution beliefs is complicated by the composite nature of the text, which means it is not always consistent in its presentation.<sup>298</sup> Whilst there are references spread throughout the Hebrew Bible to pollution, the Priestly material in Leviticus and Numbers provides the fullest example of a coherent pollution belief system. Deuteronomy also has material on pollution beliefs, which whilst it displays important differences from the Priestly material, discusses homicide pollution in a similar way. Common to all homicide pollution material in the Hebrew Bible is the polluting power of the victim's blood. That this is common to many cultures has already been noted, and it is

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<sup>298</sup> For example, skin diseases are presented as the result of sinful behaviour in some parts of the Hebrew Bible, whereas the Priestly source sees it as a physical impurity. See Num. 12 and 2 Kgs. 5.26-27 for examples of the former, and Lev. 14-15 for the latter.



certainly found in Classical Athens, though blood plays an especially important role in Hebrew belief. Blood itself was not an inherently contaminating substance in the Hebrew Bible, and encountering it did not automatically make a person polluted.<sup>299</sup> It was understood to contain the life of a living creature, and depending on the context in which it was encountered it had the ability to both be the ultimate purifying substance and a profoundly polluting substance.<sup>300</sup> As will be discussed below, the annual and *ad hoc* rituals of atonement for moral transgressions required the sprinkling of animal blood, making it a highly effective substance for cleansing impurity.<sup>301</sup> Conversely, whilst Noah and his sons are given dominion over all the animals by God, they are prohibited from consuming the blood, as the blood contains the life, and from which God will require a reckoning.<sup>302</sup>

Whilst the blood of an animal could not be consumed due to its life-bearing property, it was not otherwise a polluting substance, and so could be safely spilled as long as it was not consumed. However, the life-bearing property of a person's blood could be inherently polluting if it was spilled. The demarcation point between the blood of an animal as opposed to the blood of a person is presented at Gen. 9.5-6, wherein

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<sup>299</sup> There is no indication that a person was considered polluting if they were bleeding or had come into contact with someone who was, nor were they barred from entering the sanctuary. Menstrual blood was considered polluting, but this is in line with the polluting force of genital discharges, rather than a quality of the blood itself. See Frymer-Kenski (1983), 401.

<sup>300</sup> Barmash (2005), 96.

<sup>301</sup> See also Exod. 24.6-8; Lev. 8, 14.5-25; Wenham, (1979), 88.

<sup>302</sup> Gen. 9.2-4. This prohibition on consuming animal blood because it contains the animal's life is repeated in the Hebrew Bible several times subsequently. See Lev. 3.17, 17.14; Deut. 12.23.

God explains that humankind was made by God in his own image. Consequently, if any person spills the blood of another then their blood in turn must be spilled as a reckoning. Likewise, whilst an animal could be sacrificed, the sacrifice of a person was an act which polluted the land.<sup>303</sup> Both the life-bearing and polluting properties of blood are seen in the account of the first homicide, wherein God becomes aware that Abel has been killed because he hears Abel's blood crying out to him from the ground, and which in turn curses Cain to never again yield its strength to him.<sup>304</sup>

As blood was understood to contain the life of a person, this had a profound effect on how the Hebrew Bible conceptualised homicide and its polluting effects. The word itself is used as a metaphor for the guilt brought upon a person, their descendants, or the people when a homicide is committed.<sup>305</sup> In Deut. 22.8 it is even conceptualised as settling upon the house from which someone has fallen to their death because the owner did not put a parapet around the roof. It appears in the title of the *go'el haddam*, and its use in this context is a testament to the dual purifying and polluting nature of blood in the Hebrew Bible, as shedding the blood of the victim created a powerful impurity which could only be purified by shedding the blood of the killer.<sup>306</sup>

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<sup>303</sup> Ps. 106.38.

<sup>304</sup> Gen. 4.10-12.

<sup>305</sup> It is often used in the plural, *damim*, in this context; see Deut. 19.10; 2 Sam. 3.28-29; 1 Kgs. 2.32-33. A person who condemns themselves through their own actions is considered to have brought their own blood upon themselves; 1 Kgs. 2.37; Ezek. 33.4.

<sup>306</sup> The root לָאָג, from which *go'el* is derived, has the meaning of 'the rightful getting back of a person or object that had once belonged to one or one's family

As has been discussed, the institution of the *go'el haddam* existed alongside the cities of refuge, with the latter existing as a means of preventing the former from killing the involuntary killer. In their respective discussions of the cities of refuge, Numbers and Deuteronomy diverge on how blood-guilt operates with the *go'el haddam* and the involuntary homicide, but whilst their conceptions are somewhat different, they both rest upon the purifying and polluting properties of blood. Deut. 19.1-9 mandates the introduction of the cities of refuge to prevent the *go'el haddam* from bringing blood-guilt upon the people by slaying the involuntary killer, whose offence presumably did not bring blood-guilt because it was not intentional.<sup>307</sup> Num. 35.26-27, however, states that no blood-guilt is incurred if the *go'el haddam* kills the involuntary killer outside the bounds of the city of refuge, presenting both intentional and accidental killings as acts which incur blood-guilt. Once safely in the city of refuge, Deuteronomy sets no period of time for how long the involuntary killer is to remain there in exile, but Num. 35.28 allows the involuntary killer to return home upon the death of the high priest.<sup>308</sup> No explanation is given as to why,

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but has been lost.'; Daube (1947), 40. In this instance, it is the blood, *haddam*, which is being rightfully taken back. See also Barmash (2005), 98-99.

<sup>307</sup> Though it should be noted that if the *go'el haddam* caught and killed the involuntary killer before he reached a city of refuge, then there was no culpability placed upon him for doing so. There is no sense that he could be prosecuted himself, and blood-guilt caused by the slaying of the involuntary killer is envisaged as descending on the people as a whole. The responsibility of the people is to ensure that there are sufficient cities of refuge to allow any involuntary killer to reach one before they can be caught by the *go'el haddam*; Deut. 19.6-13.

<sup>308</sup> It is not clear whether Deuteronomy required the involuntary killer to live out the rest of their life in the city. The city of refuge allowed the involuntary killer protection from the anger of the *go'el haddam*, and it may be that the involuntary killer could leave the city once the *go'el haddam's* anger had

though it is almost certainly expiatory, with the death of the high priest purging the guilt of the involuntary killer.<sup>309</sup> Whereas the blood of the victim of the intentional killer can only be redeemed with the death of the killer, the death of the high priest redeems the blood shed by the involuntary killer, and, consequently, the presence of the involuntary killer ceases to be a cause of impurity. Whilst the two books differ somewhat, their understanding of how the institutions of *go'el haddam* and the cities of refuge operate is fundamentally informed by their understanding of the polluting effect of spilled blood. The danger that unredeemed blood poses can be found in the account of the procedure at Deut. 21.1-9 for dealing with a corpse slain by an unknown killer. As the killer is not known, then their blood cannot be shed to redeem the blood of the victim, leaving the community at great risk from its polluting effects.

Whilst the life-containing properties of blood provide the symbol for the way in which homicide pollution was conceived of, the threat it posed to the purity of the people and the land, and the consequences for not adequately dealing with the killer, require that it be placed within the context of impurity and pollution beliefs in the Hebrew Bible. Ensuring the purity of the Israelites and the land is a particular focus of the Priestly source, especially in Leviticus, and to a lesser

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subsided and they no longer wished to execute the involuntary killer; see Driver (1902), 232.

<sup>309</sup> It is unlikely to be the case that the death of the high priest is a cause for amnesty, as these usually occur upon the accession of a ruler, rather than on their death. See Greenberg (1959), 127.

degree in Numbers also.<sup>310</sup> Deuteronomy also demonstrates a concern for the purity of the people, though there is not as much material as there is in Leviticus and Numbers, and D.'s conception of its effects is slightly different to that found in the Priestly source. Although they contain less material on pollution than Leviticus, both Numbers and Deuteronomy have the more important passages for understanding homicide pollution in the Hebrew Bible. However, it is Leviticus which is the major source of Hebrew pollution beliefs, and the Priestly understanding of homicide pollution along with the risks the Israelites faced from an accumulation of polluting effects requires an understanding of how purity and impurity are conceived of in Leviticus.<sup>311</sup>

Impurity in Leviticus could be acquired by eating unclean animals, through certain acts, whether voluntary or involuntary, and by coming into contact with a person who is themselves impure. Although impurity was conceived of by P. as a polluting force which could be spread by physical contact, not all deeds which brought on impurity could be spread in this way. Those deeds that did not could pose an even greater threat to the Israelites as whole, with pollution from physical contact tending to have an effect only on an individual level.<sup>312</sup> At the heart of P.'s understanding of impurity is a pair of dichotomies found at Lev. 10.10. These are 'holy' and 'common', and 'clean' and

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<sup>310</sup> Almost half of the occurrences in the Hebrew Bible of the words for 'clean' and 'unclean' appear in Leviticus; Nihan (2013), 311.

<sup>311</sup> See Frevel (2013), 370.

<sup>312</sup> Weinfeld (1972), 225.

‘unclean’.<sup>313</sup> The threat that the unclean poses is primarily to the holy, such as the sanctuary or the priesthood, which is set apart and sacred and which must always be clean.<sup>314</sup> The common, however, can either be clean or unclean, and can move between these two states, but whilst they are unclean they pose a threat to the sacred. Although some of the acts which can incur impurity, such as adultery and theft, are also secular offences and do have punishments mandated by Leviticus, it is in the context of the threat these acts pose to the sacred that they are presented.<sup>315</sup> The Israelites themselves are conceived of as a sacred people set apart from the other nations, so any uncleanness which they incur poses a threat to them if it is not dealt with.<sup>316</sup>

Broadly speaking, the transgressions which incur impurity in Leviticus fall into two types. The first of these are transgressions which arise from either experiencing or coming into contact with things which are impure; such as skin disease, sexual intercourse, or menstruation. Coming into contact with these impurities can make a person unclean, and if the person then comes into contact with other objects whilst they are unclean then they can pollute these objects with their impurity, and from where it can then also be transmitted on to a third party rendering them unclean also.<sup>317</sup> The purification procedures for these types of

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<sup>313</sup> The Hebrew words used are *qodesh* and *chol*, and *tame’* and *tahor*. The English translations of these are taken from the NRSV.

<sup>314</sup> For example, the high priest may never leave the sanctuary, nor can he ever come into contact with a corpse, even that of his mother or father; Lev. 21.11-12.

<sup>315</sup> Lev. 18-20.

<sup>316</sup> Lev. 20.25-26.

<sup>317</sup> Lev. 11-15.

transgressions prescribe a specific period of time in which the person is unclean, and they can include a ritual which must be undertaken once this period of time is up.<sup>318</sup> Impurity in this way carries no inherent threat as the person is not expected to come to harm, nor to experience misfortune simply because they are impure.<sup>319</sup> Their impurity does become an issue, however, if they encounter the sacred, which will become infected with their pollution if they do. God warns that entering the sanctuary whilst impure will result in the death of the unclean person, and that eating a sacrificial offering whilst impure will result in the person being cut off.<sup>320</sup> As long as the unclean person avoids the sacred for the required period of time, and performs the required purification rituals, then no harm will come to them and they can return to a state of cleanliness which will allow them to interact with the sacred once again.

The second type of transgressions cover behaviour which is unclean, such as sexual intercourse with inappropriate subjects, stealing, child sacrifice, or practicing witchcraft.<sup>321</sup> In contrast to the first type of transgression, which is contagious to others and provides only a

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<sup>318</sup> The severity of the pollution affects both of these purification conditions. Touching a menstruating woman makes a person unclean until the evening, but the menstruating woman is unclean for seven days, and a woman who experiences a discharge of blood outside of regular menstruation is unclean until seven days after the discharge ends, and she must take two turtle-doves or pigeons to a priest for sacrifice before she is considered purified; Lev. 15.19-30. Frymer-Kenski separates these into 'minor pollutions', which expire in the evening, and 'major pollutions', which expire after at least seven days; Frymer-Kenski (1983), 399, 402.

<sup>319</sup> Frymer-Kenski (1983), 403.

<sup>320</sup> Lev. 7.20-21, 15.31. Being cut off likely means the extermination of the family lineage; Feder (2013), 165.

<sup>321</sup> Lev. 18-20.

temporary state of uncleanness, moral transgressions can have permanent effects which are also not directly contagious to other people. The impurity incurred by an adulterer or a person who has consumed blood, for example, cannot be passed on to another by physical contact.<sup>322</sup> The difference between these types of impurity can be seen in the example of sexual intercourse, which is an act that can overlap across both categories. Licit sexual intercourse makes both the man and woman polluted until the evening and requires bathing to remove the impurity, whilst prohibited sexual intercourse results in both parties being permanently cut off from the people, but it does not incur any contagious pollution.<sup>323</sup> Whilst these types of transgressions do not pose any threat of pollution to others on an individual basis, they do on the other hand pose a severe threat to everyone on a communal basis. Instead of infecting individuals, the pollution here accrues to the land, and the threat of this is so severe that it ultimately will result in the people being removed from the land. This was the fate of the nations who occupied the land prior to the Israelites, and the threat of the same fate extends to the Israelites who are warned that they are

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<sup>322</sup> Frymer-Kenski (1983), 404.

<sup>323</sup> Lev. 15.18, 18.29. It is worth noting that even in this form of pollution, which is primarily aimed at deeds that would be considered immoral rather than to do with bodily emissions, the disgust response as a motivator of impurity belief can be found. Intercourse with a menstruating woman is found alongside the likes of incest and bestiality as morally transgressive behaviour. In this instance, it is not the inherent status of the partner which is transgressive, but rather an otherwise licit form of sexual intercourse becomes morally transgressive for the duration of a bodily emission. This goes even further than in the case of homicide, wherein a transgressive act can elicit a disgust response to blood. Here, an otherwise licit act becomes transgressive primarily due to a disgust response caused by an emission of blood.



under the same risk of being removed from the land if they defile it with these types of transgressions.<sup>324</sup>

The unity of Priestly doctrine on pollution is called into question by the existence of these two different forms of impurity, which are derived from different types of acts and have different types of effects. As mentioned earlier, Mary Douglas sought to provide an overarching theory of pollution that would apply in all cases, and so collected all the forms of impurity in Leviticus under the rubric of boundary transgressions. Conversely, Jonathan Klawans argued that these two sets of impurities are distinct and entirely separate.<sup>325</sup> The contagious, but temporary transgressions found in Lev. 11-15 are labelled as ‘ritual impurity’ as these can be purified by a ritual, and these are ascribed by Klawans to P.; whilst the long-lasting, non-contagious, sinful transgressions of Lev. 18-20, which Klawans argues cannot be ritually purified, are ascribed to the Holiness Code and are labelled as ‘moral impurity’.<sup>326</sup> According to Klawans, these two separate pollution beliefs have been fused together and then placed side-by-side by the final redactor of Leviticus, and they do not form a coherent system. A different model again is argued for by Yitzhaq Feder, who sees infectious impurity as primary, and moral impurity, which is referred

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<sup>324</sup> Lev. 18.24-28. The idea that Israel is a land which has become polluted by the moral transgressions of the Israelites is one which recurs several times in the books of the prophets. See Ezek. 36.17-19, where Israel is compared by God to a menstruating woman in their conduct towards him; Isa. 24.5, where the transgression of God’s laws has polluted the land; Hos. 5.3, 6.10; Jer. 2.7, 3.9.

<sup>325</sup> Klawans (2000), 22, 42.

<sup>326</sup> Klawans (2000), 23, 36.

to as ‘stain-of-transgression’ as being secondary and modelled after aspects of infection.<sup>327</sup>

Regardless of the original provenance of these two forms of impurity as any of a single coherent system, two entirely separate systems, or one of the systems derived from the other system, they are unified into a Priestly doctrine of pollution by their ultimate effects. As noted, the fundamental aspect of pollution in Leviticus is the way in which it impacts on the sacred. Many of the acts which form the first type of impurity, the ‘ritual impurity’, such as bodily discharges, skin diseases, and sexual intercourse, are impurities which individuals will come into contact with over the course of their lives, and in many cases they are part of both the disgust and fear of death responses that underlines some pollution beliefs as discussed in the first part of this case study. One of the ways that a person who is unclean from a bodily discharge can pass their impure state on to another is by spitting on them.<sup>328</sup> The person who is spat on must wash their clothes and bathe to become clean again. Pollution spread by spitting would seem a good example of the role of the disgust response, much more so than pollution derived from a liminal state or boundary transgression, and as bodily fluids and disease are encompassed, there is an incentive to avoid the impure person lest their state be passed on.

Other examples of this first type of impurity do reflect more of a doctrine of liminal states, such as the woman who gives birth and is

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<sup>327</sup> Feder (2013), 166.

<sup>328</sup> Lev. 15.8.

unclean for eight days if she gives birth to a male child, or two weeks if she gives birth to a female child.<sup>329</sup> Disgust may play a part in the perception that childbirth is polluting, but the variable time period of impurity depending on gender demonstrates that it cannot be disgust alone which is causing the mother to be impure. Other than disgust and fear of death responses, what unifies these forms of impurity is that they are largely unavoidable, and they are not a secular offence. A woman cannot help but become unclean from menstruation or childbirth, a person does not choose to contract a skin disease, and whilst sexual intercourse is a choice from an individual standpoint, from a collective point of view the act is unavoidable and it does not carry any sense of being a prohibited behaviour. No blame attaches to the person who becomes impure in any of these ways as long they remain out of contact with the sacred for the duration of their impurity.

The acts which comprise the ‘moral impurities’, such as witchcraft, adultery, and child sacrifice, are both avoidable and they are regarded as sinful. These are prohibited acts which are usually done from choice, and in this instance the more structuralist expression of pollution is at work. As these are acts which the society disapproves of, then, in addition to any secular sanction, they also incur pollution in line with the religious beliefs of the society. A permanent pollution which eventually results in the land vomiting out its inhabitants as a punishment is not suitable for the first type of impurity given these are

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<sup>329</sup> Lev. 12.2-6.

unavoidable transgressions with no blame attached to them, but in the context of the religious outlook of the Hebrew Bible, and of the Priestly source in particular, which views the Israelites as a sacred people granted both the land and their status by God, then any sinful act tarnishes this status and affects their relationship with the land.<sup>330</sup> Equally, the type of disgust and fear of death-based pollution that attaches to the first type is not typically present here, so it does not incur the same type of contagious pollution.

The unifying feature of these two forms of impurity, as demonstrated by Christophe Nihan, is their impact upon the sanctuary.<sup>331</sup> With ritual impurity, the rules are designed to ensure that when a person becomes unclean they are kept away from the sanctuary until they are purified in order that they do not defile it.<sup>332</sup> On the other hand, moral transgressions, whether intentional or inadvertent, automatically defile the sanctuary regardless of the distance the transgressor maintains from it, but this impurity can be mitigated by rituals to help prevent a permanent break occurring between the Israelites and the sacred.<sup>333</sup> Lev. 16 lays out an annual ritual of atonement to be performed by the high priest which was designed to purify the sanctuary, both from physical impurities that had not been properly purified, and from all moral transgressions, both of which have accumulated and served to

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<sup>330</sup> “but you shall be for me a priestly kingdom and a holy nation.”; Exod. 19.6.

<sup>331</sup> Nihan (2013), 344-345.

<sup>332</sup> Nihan (2013), 350. 2 Chron. 23.19 records that guards were placed at the entrance to the temple to prevent anyone who was impure from entering.

<sup>333</sup> Speaking against Klawans’ assertion that they cannot be ritually purified. See also Nihan (2013), 344-349.

defile the sanctuary over the course of the previous year.<sup>334</sup> The potent purificatory power of blood is to be found here, as it is the sprinkling of the blood of a bull and of a male goat in the inner sanctum, the tent of meeting, and on the horns of the altar during this ritual, which serves to purge the impurities of the Israelites that have accumulated onto the sacred over the course of the previous year.<sup>335</sup>

The annual ritual of atonement was the only way to cleanse the sanctuary of an intentional moral transgression, but inadvertent ones could also be cleansed by a blood purification on an *ad hoc* basis.<sup>336</sup> In these instances, the transgression did not necessarily pollute the whole sanctuary, but the status of the transgressor did impact on the extent to which it became defiled. An inadvertent transgression by the high priest required a bull to be sacrificed and its blood sprinkled before the curtain separating the sanctuary from the inner-sanctum, on the horns of the inner altar, with the remainder poured out at the outer altar.<sup>337</sup> If an ordinary person transgresses unintentionally, then a female goat is to be sacrificed and its blood sprinkled on the outer altar, with the remainder poured out at the base of the outer altar.<sup>338</sup> Based upon the ritual of atonement and these *ad hoc* rituals, Jacob Milgrom has demonstrated that there existed in Leviticus a three-stage, dynamic understanding of impurity and its polluting effect on the sanctuary,

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<sup>334</sup> Nihan (2013), 345.

<sup>335</sup> Lev. 16.15-19.

<sup>336</sup> Lev. 4; Num. 6.9-12.

<sup>337</sup> Lev. 4.3-7.

<sup>338</sup> Lev. 4.27-30.

based upon the nature of the impurity and the transgressor.<sup>339</sup> Whereas physical and inadvertent moral transgressions form the first two stages, the third and most severe is that of the intentional moral transgression, which serves to pollute the entire sanctuary all the way into the inner sanctum.<sup>340</sup> This form of impurity can only be purged by the annual rite, and it must be done to prevent the sanctuary from becoming so polluted that the Israelites' relationship with God reaches the point of no return, with the result that they are removed from the land.<sup>341</sup>

The Priestly material on impurity extends into Numbers also.<sup>342</sup> Here, as with Leviticus, becoming impure prevents a person from interacting with the sacred, so as to prevent the passing of their impurity onto it. Num. 1-4 contains rules for the organisation of the Israelites' camp during the desert migration, in which a conceptual space is created within which the sanctuary is placed in the centre, the Israelites around it are 'inside' the camp, and at the periphery is 'outside' the camp.<sup>343</sup> The concept is an elastic one which can be applied in other contexts to make it relevant to the audience. For example, it can be applied to the sanctuary, the land, and the neighbouring lands.<sup>344</sup> Incurring impurity can prevent a person from moving from the camp or the land to the sanctuary and can even cause them to be removed to outside the camp

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<sup>339</sup> Milgrom (1983), 70-84.

<sup>340</sup> Milgrom (1983), 78-79.

<sup>341</sup> Milgrom (1983), 81-82.

<sup>342</sup> Frevel (2013), 407.

<sup>343</sup> Frevel (2013), 378-381.

<sup>344</sup> Frevel (2013), 378-381.

or the land for a period of time, such is the threat their impurity can pose to the centre.

Although impurity caused by discharges or skin diseases is discussed in Numbers, particular focus is given to impurity caused by coming into contact with corpses, which is the most virulent form of pollution a person can acquire.<sup>345</sup> So potent is the pollution it incurs, that a person coming into contact with a corpse is to be put outside of the camp, whilst a Nazirite can never intentionally come into contact with a corpse as they are set apart to God and thus have a sacred status, those who have come into contact with a corpse must wait until a later date to celebrate the Passover, touching a corpse makes a person unclean for seven days, including for those who have killed with the sword, and those who do not purify themselves after coming into contact with a corpse defile the sanctuary, even from afar.<sup>346</sup> In this, Numbers presents an understanding of death as the ultimate form of impurity, and as such it is inimical to the life-giving power of the holy.<sup>347</sup> As long as the person made impure through contact with a corpse is kept sufficiently away from the sacred for the specified period of time and then performs the requisite purification rituals, then they do not defile

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<sup>345</sup> Skin diseases may be considered severely polluting precisely because they result in the person resembling a corpse. See Num. 12.12; Frymer-Kenski (1983), 400.

<sup>346</sup> Num. 5.2-3, 6.6-12, 9.6-12, 19.11-13, 31.19. Although other forms of impurity are discussed in Numbers and also result in the polluted person being put outside of the camp, it is specifically contact with corpses which prevents attendance at the Passover at the appointed time. See also Frevel (2013), 396-397.

<sup>347</sup> Frevel (2013), 395-396. See also Ezek. 9.7, 23.38-39. This is reminiscent of the argument of Meigs that the body contains the life force of the individual, and that pollution taboos derive from a fear of death; Meigs (1978), 304-318.

the sanctuary. This places corpse pollution amongst the first type of impurity in the Priestly doctrine.

No inherent moral pollution is incurred simply for coming into contact with a corpse, though it suggests that even the lawful homicide incurs a virulent pollution from their unavoidable contact with a corpse, and indeed outright states this in the case of killing in battle. This is in marked contrast to the Priestly view on intentional and involuntary homicide. These offences fall squarely into the category of a moral impurity, and Num. 35.31-34 is explicit in its presentation of the grave risks the act poses to the land if the homicide is not dealt with by removing them from the land. The polluting threat of a homicide is here tied closely to the laws on homicide in Num. 6-30, in that an intentional homicide can only be expiated by shedding the blood of a killer, whilst an involuntary homicide can be expiated by the removal of the killer to a city of refuge, and the defilement this act brings can be wiped from the land by the expiatory death of the high priest. A strict ban is placed on the next of kin accepting a ransom payment in lieu of punishment at 35.31-32, as taking a payment does not redeem the blood which has been shed. Instead, the defilement will remain in the land and risk the relationship of the Israelites to it.

Deuteronomy has much less material on impurity and pollution than is found in the preceding two books, and the conception of pollution that D. presents also differs in some respects from that found in the Priestly source. Pollution in Deuteronomy is concerned with its effect on the



people rather than on the sanctuary or the land.<sup>348</sup> In line with P., it does also share the idea that the previous inhabitants of the land were expelled because of their wicked deeds, and the Israelites are warned in it not to imitate those deeds, though here there is no threat that they will lose the land if they do.<sup>349</sup> Whilst Deuteronomy shares with P. the idea of the Israelites as a holy people, this is not dependent on the behaviour of the people, but rather it is an automatic status granted to them by their covenant with God.<sup>350</sup> That said, it is not the case that there is no threat to the status of the Israelites if they do not conduct themselves correctly, as Deut. 28.15-68 lays out in great detail all the misfortunes which will befall them if they do not obey God's commandments and decrees, but there is no equivalence to the gradual accumulation of moral impurity that will, if not ritually atoned for, pollute both the sanctuary and land. This means that in Deuteronomy, the conception of impurity as a dynamic and threatening force, which ultimately risks severing the people both from God and from the land is not present.<sup>351</sup> Homicide does, however, still pose a polluting risk to the community in Deuteronomy if it is not adequately dealt with. The

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<sup>348</sup> Although the sanctuary and centralisation of the cult plays an important role in Deuteronomy, its outlook is more secular than that found in the Priestly material; Weinfeld (1972), 179-189.

<sup>349</sup> Rüterswörden, (2013), 417, 426-427; Weinfeld (1972), 225-226; Deut. 9.4-5, 18.9-12. The idea that the previous inhabitants of the land were driven from it due to their wicked deeds is also found in the Deuteronomic history at 1 Kgs. 14.24; 2 Kgs. 16.3, 21.2. An explicit link is made in 2 Kgs. 17.7-8 between the wicked deeds of the people of Samaria, a city located in the northern kingdom, and its destruction and the deportation of its inhabitants by the Assyrians, though this is presented as a retrospective cause and effect, rather than a doctrine of the effects of wicked deeds on the land.

<sup>350</sup> Deut. 22.18-19; Regev (2001), 252-253.

<sup>351</sup> Regev (2001), 243-261.

Israelites are here commanded to purge the guilt of innocent blood by putting the killer to death, so as to ensure that things will go well for them.<sup>352</sup> It is Deuteronomy which recognises that blood-guilt in the case of an unknown assailant could pose a great risk to the community, and provides the ritual of the heifer as the vehicle for removing it, and it is in Deuteronomy where blood-guilt can be envisaged as not only affecting people, but buildings also.<sup>353</sup>

Whilst the Priestly outlook on impurity is not found in Deuteronomy, both do have important similarities with regards to homicide pollution. They each envisage the killing in terms of the blood of the victim, in keeping with the Hebrew Bible's conception of blood as the life of a person, and the multiple examples throughout of the blood of the victim descending on the killer. They envisage that the blood-guilt brought about by the killing affects more than just the killer. For P. it is the sanctuary and the land, and for D. it is the people. Each require that the killer must be dealt with by either execution or exile to remove the blood-guilt, and there is a collective responsibility placed on the people to ensure that shed blood is redeemed, but the obligation falls onto the next of kin in the role of the *go'el haddam*, whether this meant bringing a prosecution or catching and executing the killer themselves.

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<sup>352</sup> Deut. 19.13.

<sup>353</sup> Deut. 22.8; see also McKeating (1975), 64.

## The Function of Homicide Pollution in Classical Athens and the Hebrew Bible

This survey of homicide legislation and pollution in the Hebrew Bible allows for theories on the function of Classical Athenian homicide pollution to be tested against it. Whilst the sophisticated court system of Classical Athens is not found in the Hebrew Bible, nor was it lacking in formal legal institutions. Whilst there was no system of public prosecution, nor was there one in Athens. Much as the next of kin was required to bring a prosecution for homicide in Athens, so the next of kin in the form of the *go'el haddam* was required to do so in the Hebrew Bible. It may have been the case that a greater degree of self-help was granted to the *go'el haddam* than was found in Athens, but in principle the two systems worked in the same way. Much as someone accused of homicide in Athens was entitled to a trial, so they were in the Hebrew Bible. The laws on the cities of refuge allow for the elders in the city to render a judgement on the accused's guilt.<sup>354</sup> Deuteronomy lays out an entire judicial system, beginning with judges to be appointed in every town that are required to be impartial and to refuse bribes.<sup>355</sup> If these judges cannot resolve a dispute, including ones involving homicide, then they are to refer the case to the Levitical priests to render a judgement instead.<sup>356</sup> Further, in both Numbers and

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<sup>354</sup> Deut. 19.12; Josh. 20.4-6.

<sup>355</sup> Deut. 16.18.

<sup>356</sup> Deut. 17.8-11.

Deuteronomy, a high evidentiary burden is placed on homicide trials in requiring there be multiple witnesses in order to secure a conviction.

Nor does this argument on the function of homicide pollution make much sense in the wider context of pollution in the Hebrew Bible. A wide array of circumstances are envisaged as causing pollution, and in all cases these are linked to either the relationship of the Israelites to the land or with God. Homicide pollution is bound up with pollution caused by the likes of sexual offences and witchcraft. All of them pollute in the same way, and each requires the offender to be removed from the community due to the risk their pollution poses.

That the severity of the pollution was tied to the severity with which the killing was regarded in both Classical Athens and the Hebrew Bible demonstrates that, *contra* Eck, pollution was capable of making the kind of fine distinctions required by their respective homicide legislation.<sup>357</sup> There is no evidence in the Hebrew Bible that killing in warfare caused any pollution, aside that from contacting a corpse, which whilst it does not disprove Eck's theory, it does show that it is not a requirement for homicide pollution beliefs to develop.

An important area of common ground can be found between Classical Athens and the society of the Hebrew Bible, and it is one which helps to understand why these two societies envisaged a pollution accruing from homicide, whereas other neighbouring ones did not. These other

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<sup>357</sup> Although the Hebrew Bible would not speak strongly against his assertion that guilt was a requirement for pollution given that modern scholarly understandings of guilt culture are largely based on Christianity.

societies could envisage the blood of the victim attaching itself to the killer in a similar manner to Athenian and Hebrew sources, but it was not envisaged as extending beyond this to threaten the community.<sup>358</sup> It is not that these other societies did not envisage any acts as capable of accruing pollution on the offender, but where it is found in the cuneiform sources it is with respect to sexual offences rather than for homicide.<sup>359</sup> The *Constitution of Telipinu* states the Hittites allowed the head of the victim's family to decide whether to accept a payment or to enforce the death penalty, whilst the Hittite laws prescribe a level of payment dependent on the circumstances of the killing.<sup>360</sup> However, illicit sexual offences carried the death penalty, and if the king pardoned the offender then they could not in future approach the king as they would defile his royal person.<sup>361</sup> In one instance, a sexual offence which carries no criminal penalty prevents the offender from ever approaching the king or becoming a priest.<sup>362</sup> Nothing comparable is found in the Hittite homicide laws. This was an entirely private matter to be resolved between the killer and the victim's family with no risk to anyone else.

The Middle Assyrian Laws also allowed compensation to be accepted at the discretion of the head of the victim's family, and although other Near Eastern sources reflect only the death penalty for homicide,

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<sup>358</sup> Barmash (2005), 111-112.

<sup>359</sup> Westbrook (1988b), 82.

<sup>360</sup> *Constitution of Telipinu* 49; HL 1-5; Haase (2003), 644; Westbrook (1988b), 49-50.

<sup>361</sup> HL 187-200a.

<sup>362</sup> HL 200a.

Westbrook has convincingly argued that the wronged party had the right to accept a ransom payment that was automatically assumed, and thus it was not required to be explicitly stated.<sup>363</sup> It has already been noted that the trial scene on the Shield of Achilles regards a blood payment owed, and elsewhere in the *Iliad*, Ajax states that a man can accept a payment for his dead brother or son from the man who killed them, and if it is accepted then the killer can remain among the people.<sup>364</sup> Unlike Classical Athenian and Hebrew sources, there is no concern from the community that the killer be removed from it, nor any sense that by allowing the killer to remain the community is placed at risk from their pollution. The concerns of the next of kin are paramount in these sources, not those of the community.

In its ban on the practice of accepting a ransom payment from a killer, Num. 35.31-32 assumes that the principle of accepting payments must have been known, as there would have been no need to prohibit it otherwise. The practice is alluded to in the Hebrew Bible at 2 Sam. 21.1-9, wherein God informs David that a famine in the land is the result of an unresolved blood-guilt brought on by Saul. Whilst he was king, Saul had attempted to wipe out the Gibeonites, a non-Israelite people whom the Israelites had sworn to spare. In their discussion with David over how to remove the blood-guilt, they reject a payment of

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<sup>363</sup> MAL A 10. "It was accepted throughout the Ancient Near East that injury or killing gave rise to a right to revenge by the victim and/or his family on the perpetrator and/or his family. It was equally accepted that that same right could be commuted into a money payment, i.e. that revenge could be bought off with a ransom."; Westbrook (1988b), 45.

<sup>364</sup> Hom. *Il.* 9.632-635.

gold or silver, and demand that seven of Saul's sons be handed over to them to be impaled.<sup>365</sup> If Westbrook is correct, and a right of payment in lieu of punishment was assumed in the cuneiform sources, then it would provide the context for the necessity of an explicitly-stated ban on the practice.

The evidence from the *Iliad* demonstrates that ransom payments for homicide had once been a practice in Greece, and Classical Athens also explicitly placed a bar on its practice.<sup>366</sup> Whilst it may not necessarily be the case that a doctrine of contagious and threatening homicide pollution automatically meant a bar on accepting ransom payments, the two elements are explicitly linked in Numbers. A ransom payment cannot be taken, the blood of the intentional killer must be shed and the accidental killer must remain in exile, as to fail to do so pollutes the land. Whilst the Classical Athenian sources do not explicitly link the two, it is not an unreasonable assumption that the fear of a contagious pollution harming the community was bound up in the bar on accepting ransom payments for homicide.<sup>367</sup> More importantly, it speaks strongly against the argument of Parker that pollution was a feature of Homeric Greece, in which the system of ransom payments is conceived of as

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<sup>365</sup> The blood-guilt here differs from that presented in Numbers and Deuteronomy in some important ways. It can be redeemed with the blood of the killer's descendants, not just the killer himself. It is an example of misfortune pollution. A misfortune has occurred: the famine, and the blood-guilt is retroactively applied as the explanation. Also, it is unlikely to be the case that Saul carried out all of the killings himself, but rather would have been likely to have ordered them instead.

<sup>366</sup> Dem. 23.35.

<sup>367</sup> Even if the pollution is just the expression of the community or state's desire to remove a killer, rather than the motivating force for it.

buying off the victim's family's private right of redress, and allowing the killer to remain in the community with no sense that the killer possesses any form of contagious pollution.<sup>368</sup> In both cases, it seems that the introduction of a bar on ransom payments went hand-in-hand with the development of a doctrine of homicide pollution.

Fundamental to a functionalist understanding of homicide pollution is that it must be the product of the society from which it originates. As Douglas herself argues, pollution is the expression of the violation of a system which it presupposes, and Parker also makes a similar argument.<sup>369</sup> This means that wherever homicide pollution is found, it must be considered the expression of that society. If no homicide pollution beliefs are found in Homer, it must be accepted that it either was not there, or that we cannot know if it was there.<sup>370</sup> When homicide pollution beliefs are found in fifth and fourth century Athens, it must be accepted that those beliefs both belong there and that they are the expression of that society. To understand Classical Athenian homicide pollution requires understanding it in its context. The varying degrees of pollution which could attach to a killer, whether a homicide or not, demonstrate a close correlation with the Classical Athenian laws on homicide, and cannot be understood without reference to them.

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<sup>368</sup> Hom. *Il.* 9.632-635.

<sup>369</sup> Douglas (2002), 44; "the vehicle through which social disruption is expressed"; Parker (1983), 121.

<sup>370</sup> As noted, the evidence would suggest that it was not there. See also Harris, (2015).



As has been seen, there were public spaces where the presence of a homicide was seen to be detrimental to the community. They were barred from the *agora*, from attending public sacrifices, public meetings, and from entering sacred spaces. These sanctions are a product of the *polis*, itself the product of the Archaic period. The Homeric period does not have the same understanding of public space, and it did not see the presence of a homicide as a threat to public space.<sup>371</sup> By expressing the negative effects in terms of the impact it could have on public spaces, the Classical Athenian conception of homicide pollution was expressing the concerns of the community over the presence of a killer in its midst. What had previously been seen in Greece as only a private wrong to the victim, became by the Archaic and Classical periods a concern of the entire community to remove a killer from its midst, and the development of homicide pollution as the expression of that concern cannot be seen apart from the development of the *polis* over the same time.

This arrival of homicide pollution into the Athenian imagination was the result of the combination of this concern alongside the traditional legal right of the next of kin to prosecute. The Athenians did not go as far as to remove this right, and to make a homicide primarily a public offence instead of a private one, but they did restrict the right to accept a payment to settle the offence, and they did begin to express their anxiety over the continuing presence of a killer in the community by

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<sup>371</sup> Harris (2015), 25-26.

assigning a polluting quality to the act which risked not the individuals the killer came into contact with, but the entire community if the killer entered the public spaces of the *polis*. So great was this concern, that at some point during this period they did make homicide a public offence in the specific circumstance of an accused killer entering these spaces. A convicted killer had to be removed from the community, whether by execution or by exile, and so homicide pollution was also expressed in terms of placing at risk the people responsible for bringing a successful prosecution. Neither the pollution that placed the community at risk, nor the pollution that placed the next of kin and the *dikastai* at risk, was primary over the other. They were instead the collective expression of Athenian concerns, which played out alongside each other to ensure the *polis* was not placed at risk by the presence of a killer. Classical Athenian homicide pollution beliefs are the expression of Classical Athenian concerns. Their expression is so closely wrapped around the *polis*, and around Athenian homicide law, that they cannot be seen apart from them.

There are differences in how homicide pollution beliefs were expressed in Classical Athens and in the Hebrew Bible. The enduring power of blood imagery with regard to killing is found in both, but it is much more prominent in the Hebrew Bible due to its understanding of blood as containing the life force of a person, and its consequent powerful purificatory, expiatory, and polluting effects. Conversely, the emphasis on the anger of the victim infecting those who fail to prosecute a killer

is not found in the Hebrew Bible.<sup>372</sup> It is a product of the Classical Athenian court system, not of the broader theological concerns of the Hebrew sources. These differences, however, are differences in expression as opposed to a difference in function, and they are born from differences in Classical Athenian and Hebrew society. The function and purpose of homicide pollution in the Hebrew Bible remains the same as that found in Classical Athens. Homicide pollution here also expresses the concerns of the community over an offence that was traditionally a private wrong to the victim, to be settled by the victim's family.

The communal concern here is not the *polis*, but rather it is a theological one. Two separate sources, P. and D., express the concern slightly differently, whether through the medium of a covenant, a sanctuary, or the land, but the same concern exists in both. Consequently, the pollution here is not one that risks infecting communal spaces but is one that risks the community's occupancy of the land and their status with God. Much as in Athens, homicide pollution in the Hebrew Bible is the expression of Hebrew concerns, and their expression is wrapped around the Hebrew homicide laws in their bar upon accepting payments, in the understanding of the role of the next of kin as the *go'el haddam*, the exile of the involuntary killer in a city of refuge, and its expiry at the death of the high priest. In both societies, homicide pollution served as the religious expression of the

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<sup>372</sup> Though the blood of the victim can be an expression of the distress of the victim; see Gen. 4.10 and Job 16.18.

point where a traditionally private wrong intersected with the concerns of the community.

## Conclusion

Despite the evidence for a belief in homicide pollution found in a number of Classical Athenian sources, influential studies such as those of Douglas MacDowell and Robert Parker have led to a tendency amongst a number of Greek legal scholars to de-emphasise homicide pollution beliefs in Classical Athens. The purpose of this case study has been to re-examine the evidence for Classical Athenian homicide pollution in the context of a comparative study of homicide pollution in the Hebrew Bible in attempt to locate its function. As the Hebrew Bible is only the surviving Near Eastern source that betrays a concern over pollution caused by homicide, it provides an important test case for examining theories as to its role and function in Classical Athens.

The study has demonstrated that in each society, homicide pollution was expressed in a way that corresponded closely to their laws on homicide. Blood imagery was an especially important element of Hebrew belief but was found in Athens also, and in both cases it was not simply a mechanical expression of their societal values. Neither society demonstrated any great emphasis on attributing actual misfortune to unresolved homicide pollution, yet it was still very clearly of great concern in the Hebrew Bible that homicide pollution be dealt with. Whilst the Hebrew judicial system was not as sophisticated

as the Athenian one, they did have a one which served the same function, and homicide pollution in the Hebrew Bible was not intended to replace a judicial system. Both societies also betrayed great concern over the polluting effects of a killer in the community, and it is here that a common function of homicide pollution across both societies can be found.

What separated Classical Athens and the Hebrew Bible from neighbouring societies that had similar homicide laws without betraying any concern over homicide pollution, was that homicide in the ancient world was a private offence, but in Classical Athens and in the Hebrew Bible there existed a communal concern over removing a killer from the midst of the community. In Athens, this was a concern of the *polis*, and it was correspondingly expressed in terms of the public spaces of the *polis*, and the Athenian court system in which the offence was prosecuted. In the Hebrew Bible, this was a theological concern over the relationship of the Israelites to God and their continuing occupancy of the land, and it was correspondingly expressed in those terms. There were certainly differences in how homicide pollution was expressed in each society, but these simply reflected differences in those societies. The actual function of homicide pollution was the same in each, as it was the expression of the concerns of the community over an offence that was traditionally a private affair.

## A Comparison of Near Eastern Adultery and Greek *Moicheia*

### Introduction

In English and Welsh modern law, adultery is defined as the act of sexual intercourse between a married person and another person who is not their spouse; it is not a criminal offence, and nor does it discriminate on grounds of gender.<sup>373</sup> There is no legal compunction for the injured party to act if they discover their spouse has committed adultery, and the only legal relevance of adultery is that it is one of the five facts for proving that a marriage has irretrievably broken down, and so it can allow for a divorce to be granted.<sup>374</sup> If a divorce does occur as a consequence of adultery, it has no impact upon the financial

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<sup>373</sup> Herring (2015), 139, 142- 143.

<sup>374</sup> Herring (2015), 142.

settlements between the couple, nor any decisions made over child custody.<sup>375</sup> The third party is also considered to have committed adultery, but beyond being the grounds for a divorce, there are no other legal ramifications for them.

Broadly speaking, adultery was the same offence in the ancient Near East, in that it covered acts of extra-marital sexual intercourse, but it differed in the details on almost every point. Despite the variety of civilisations and the broad amount of time covered by the period, it is possible to speak of a common approach to adultery law in the ancient Near East, given the remarkable lack of variability in both the definition of the offence and in how it was punished. Near Eastern adultery legislation did discriminate on grounds of gender as it was only concerned with whether the woman was married, not the man. A husband could have sexual intercourse with a woman other than his wife without committing adultery, as long as the woman herself was not married.<sup>376</sup> Adultery was a serious offence, which left both parties liable to punishments up to and including a capital sentence, and if the husband chose to divorce his wife, she could be subject to a financial penalty in the divorce settlement.

By contrast, the Greeks demonstrated no separate and distinct conception of adultery as a specific individual offence, and instead presented it as just one example of a broader offence, that of *moicheia*,

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<sup>375</sup> Herring (2015), 27.

<sup>376</sup> Which is not to say it could never be an offence for the husband, especially with regards to intercourse that impacted upon a daughter's ability to marry, but this was not adultery.

or 'seduction'. This offence covered sexual intercourse between a man and woman who was under the control of a *kurios*, assuming the man was not her husband. Whilst this did cover adultery, as her husband was her *kurios* if she was married, it was not restricted to this, and if she was unmarried it could cover parental and sibling relationships also. The extent to which this is an accurate reading of Greek laws has been disputed in modern scholarship, with David Cohen in particular arguing that this reading of *moicheia* misunderstands the offence, and that it was in fact no more than just adultery. However, there are several uses of the term in Greek sources which clearly demonstrate the contrary.

There further existed another important distinction between the Greeks and their neighbours with regards to adultery, which comes to light when their laws on *moicheia* are compared with Near Eastern adultery law. This distinction is found in their approach to punishment. Adultery in the Near East was an offence by the adulterous couple against the husband, and whilst capital punishment was an option, a significant amount of discretion was usually given to the husband in choosing exactly what the punishment would be. The one restriction he was placed under was that whatever punishment he chose for the lover had to be meted out in equal measure to the wife. The husband could not choose to kill the lover and pardon the wife. In Classical Greece, there is no reliable evidence that this was the case, and strong evidence to the contrary. The Athenian lawcourt speech, *Against Eratosthenes*,



demonstrates that at least in Athens, a husband could go as far as to kill his wife's lover whilst subjecting his wife to no punishment at all.

The first part of this case study will survey the Near Eastern evidence for adultery law, which demonstrates a consistent and cohesive approach to the offence across the region, with minor regional variations noted. The second part of the case study will examine the Greek evidence for *moicheia*, both in terms of the nature of the offence and the punishment for it. The case study concludes with a comparison of the two, from which an argument is made that the difference in conception between *moicheia* in Greece and adultery in the Near East is what led to the Greeks having a distinct approach to punishing the woman.

### Adultery Legislation in the Near East

The evidence which comprises the adultery legislation surveyed in this section comes from across the Near East and is distributed over a long period of time. Caution should certainly be exercised when using such a broad diachronic and synchronic survey for a comparative study. There is a danger of smoothing over differences and homogenising evidence from a variety of cultures in the process of using them for a comparative study with the Greeks. This is especially true given the tendency noted in the introduction for modern scholarship to treat these civilisations under the umbrella of the 'Near East' and approach them

as a distinct identifiable unit, both in and of themselves and as opposed to the Greeks.

Whilst the following case study does draw from a wide variety of Near Eastern civilisations, the core of the evidence is from Mesopotamia, with legislation found in multiple law codes that span several centuries and range across the region, along with evidence of the day-to-day regulation of adultery law spanning the earliest and latest periods covered by this survey in form of records of Sumerian adultery cases and Old Babylonian documents detailing ordeals found in Mari at one end, and Neo-Babylonian divorce documents at the other.

Many of the arguments made in this case study could be made with specific reference to the Mesopotamian evidence, and it may be the case that a more focused study based upon them or upon evidence from elsewhere in the Near East could yield results that are more nuanced and in-depth, and which may possibly highlight greater regional variation. However, whilst the evidence from outside of Mesopotamia is not as full and performs something of a complimentary role, its inclusion in this survey is important to demonstrate the extent to which a uniformity in approach to adultery legislation can be found in the Near East. Without it, important similarities cannot be highlighted, and the conclusions drawn in this comparative study cannot be as firmly made. Despite the chronological, cultural, and geographical distance covered in this survey, the civilisations of the Near East do demonstrate a remarkable consistency in approach to adultery legislation, and a survey which is restricted to just one area of the Near East would

disregard important comparative evidence. At the same time, this study does not attempt to examine every piece of surviving evidence for adultery legislation in the Near East as to do so risks making the study too superficial and lacking in depth. Instead, sufficient evidence is surveyed to build a consistent and coherent picture of adultery legislation in the region.

### The Definition of Adultery

For an act to be considered as adultery, it needed to have three features. Firstly, it must involve sexual intercourse, secondly, the woman must be married, and thirdly, it must involve a man other than her husband. The marital status of the man is not important, and none of the laws envisage intercourse between a married man and someone other than his wife as adultery, other than where the woman is herself married. Nor do any of the laws on adultery ever consider sexual intercourse between two people of the same gender.

The Law Code of Eshnunna demonstrates the importance of the marital status of the woman.

#### **Law Code of Eshnunna 27-28**

If a man marries the daughter of another man without the consent of her father and mother, and moreover does not conclude the nuptial feast and the contract for(?) her father, and mother, should she reside in his house for even one full year, she is not a wife.

If he concludes the contract and the nuptial feast for(?) her father and mother and he marries her, she is indeed a wife; the day she is seized in the lap of another man, she shall die, she will not live.

This is not an adultery law *per se*, but rather one which is concerned with defining whether a woman co-habiting with a man is considered to be married to him. Without the permission of her parents, a contract with them, and a marriage feast, then the woman is not considered to be married no matter how long the couple live together. If these elements are subsequently satisfied, then they are then considered to be married, and the woman is now a wife. The importance of this for the definition of adultery is it means that if she is found in the lap of another man, she is liable to be punished as an adulteress.<sup>377</sup> If she had not fulfilled the marriage conditions, then she would not be liable to a capital charge as she is not a wife, meaning an unmarried woman in the

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<sup>377</sup> Yaron points out that there is no distinction in the Akkadian of the period of LE between masculine and feminine in the third person singular. There is no question that 'she' is meant with regards to being seized in the lap of another man, but after that it is possible that the translation should be 'he shall die, he will not live', as changes in gender do occur elsewhere in LE. Consequently, she argues that the punishment here is for the man, with the woman to be turned over to her husband for punishment; Yaron (1969), 189-190. Against this, Roth argues that as the passage is concerned with defining the woman's status as a wife, then it is her life which is at stake should she be found in the lap of another man. By being legally married, she can be punished as an adulteress; Roth (1988), 205-206. Of course, the opposite assertion could also be made. As the woman is legally a wife, then the man is liable for the death penalty as an adulterer if she is found in her lap. Either way, what is important here is that for either party, no matter which is intended, the key fact that leaves them liable to punishment for adultery is that the woman is legally a wife.

Eshnunna law code cannot commit adultery, even if she is co-habiting.<sup>378</sup>

As just being caught in the act left open possible defences of rape for the wife, and lack of knowledge that the woman was married for her lover, then the liability of each party could change depending on the circumstances in which the intercourse took place. If the circumstances meant the man could reasonably not be considered to know the woman was married, then he is absolved of any blame.<sup>379</sup> The Law Code of Ur-Nammu absolves the man if the woman has approached him. Presumably, she is away from her home, and as he is pursued rather

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<sup>378</sup> A similar law is found at LH 128, which states that if a man marries a woman, but does not draw up a marriage contract for her, then the woman is not a wife. There is no mention of what will happen to the woman if she found with another man, but presumably it will be as in LE 27-28, and she will not be liable as an adulteress. See Petschow (1990), 59-60.

<sup>379</sup> In Sumerian wisdom literature, if the young man has knowledge of the wife's marital status, he is warned to not sit with her or laugh with her to prevent even the rumour of adultery from arising; Alster (2005), 63; *Instr. Šur.* 33-34. Three very similar stories in the Hebrew Bible suggest that in Judah and Israel, ignorance of the marital status of the woman may not be sufficient to absolve the adulterer of liability. In Gen. 20.2-9, Abimelech takes Sarah from Abraham in the mistaken belief that she is not Abraham's wife, but his sister. Abimelech is saved from punishment only because God appeared to him in a dream and warned him of Sarah's marital status, and even then, it is only because he has not yet touched Sarah, and so has not actually committed adultery. Had he done so he would have been liable to punishment regardless of his ignorance. A very similar story is recounted in Gen. 12.10-16, in which Pharaoh takes Sarah, also in the mistaken belief she is Abraham's sister and not his wife. This causes God to inflict great plagues upon Pharaoh and his house, even though he was not aware that Sarah was married. Finally, Isaac passes his wife, Rebekah, off as his sister to people of Gerar. When the king discovers that Isaac and Rebekah are married, he rebukes Isaac for placing the people of Gerar at risk if one of them had touched her because they thought she was not married. In the first two cases, the potential or actual punishment is to be inflicted by God, it is not clear where the punishment would come from the Isaac story, but that it would be divine also is likely. As these are variations on a single story placed in the patriarchal period, caution should be exercised in reading too much into them. It may be that they represent a theological outlook rather than are reflective of any actual legal practice.

than pursuing, the man could reasonably claim he did not know the woman was married.<sup>380</sup>

### **Law Code of Ur-Nammu 7**

If the wife of a young man, on her own initiative, approaches a man and initiates sexual relations with him, they shall kill that woman; that male shall be released.

The same principle is found in the Middle Assyrian Laws:

### **Middle Assyrian Laws A 13, 14**

If the wife of a man should go out of her house, and go to another man where he resides, and should he fornicate with her knowing that she is the wife of a man, they shall kill the man and the wife.

If a man should fornicate with another man's wife either in an inn or in the main thoroughfare, knowing that she is the wife of a man, they shall treat the fornicator as the man declares he wishes his wife to be treated.

If he should fornicate with her without knowing that she is the wife of a man, the fornicator is clear; the man shall prove the charges against his wife and she shall treat her as he wishes

Here, the act taking place away from the woman's home is not an automatic defence for the man, and he is liable for punishment even if

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<sup>380</sup> Concern that married women will chase after men is found in several ancient Near Eastern sources. See Reiner (1975), 95-96; Gen. 39.7-12; Prov. 7.

the act takes place at his home, an inn, or in public, as long as he knows the woman is married. The laws do not assume that simply because the act takes place away from the woman's home that the man could reasonably claim not to know she was married, albeit they do not define how he would be expected to know. However, if he does not know, then here too he is absolved of any liability.

The Hittite Laws also seek to determine where liability lies based upon the location of the act:

#### **Hittite Laws 197**

If a man seizes a woman in the mountains (and rapes her), it is the man's offense, but if he seizes her in her house, it is the woman's offense: the woman shall die. If the woman's husband discovers them in the act, he may kill them without committing a crime.

Here, if the act takes place in the mountains, it is considered rape, and the liability lies with the man. However, if the act takes place in the woman's house, then the offence is hers, and both can be held liable. The man's knowledge of the woman's marital status is not important, only where the act took place. This law does not consider any other locations in which the act could take place, and no explanation is given as to why the offence is the man's if it takes place in the mountains, and the woman's if it takes place in her home, but a similar law in Deuteronomy draws a similar distinction, and does give an explanation as to why.

**Deut. 22.23-27**

If there is a young woman, a virgin already engaged to be married, and a man meets her in town and lies with her, you shall bring both of them to the gate of that town and stone them to death, the young woman because she did not cry for help in the town and the man because he violated his neighbour's wife. So you shall purge the evil from your midst.

But if the man meets the engaged woman in the open country, and the man seizes her and lies with her, then only the man who lay with her shall die. You shall do nothing to the young woman; the young woman has not committed an offence punishable by death, because this case is like that of someone who attacks and murders a neighbour. Since he found her in the open country, the engaged woman may have cried for help, but there was no-one to rescue her.

The distinction here is between a rural and urban location, and it is likely that a similar principle could be extrapolated from 'mountains' and 'home' in HL 197. The reason the woman is not held liable if the act takes place in a rural setting is because if she cried out for help then no-one would be able to hear her. Conversely, there would be many people in the town who could hear her, and if no-one did, then she must not have cried out, and thus the act must have been consensual. In a rural area, intercourse between a wife and a man other than her husband



is automatically considered to be rape, whilst in a town, and in the absence of evidence showing otherwise, then it is adultery. There is a regional variation to be noted here, as the woman in question is not actually married, but rather is engaged to be married. It is unlikely to be the case that this principle would not extend to a married woman also, but a clear distinction would seem to exist between Deuteronomy and the Law Code of Eshnunna, where there is only a provision to punish the woman if she is formally married with permission of her parents. LE does not seem to consider a transitory ‘betrothed’ state in which a woman could be punished in a similar manner as to a wife before she is married. There, she is either married or she is not.<sup>381</sup>

#### Punishments for Adultery

Without exception, all Near Eastern societies, where evidence for the punishment of adultery survives, regarded the act as a capital offence for both the adulterer and the wife. Legislation to this effect has already been seen in a Babylonian and an Assyrian context with LE 28 and MAL A 13 and 14, and it is found again in the Law Code of Hammurabi:

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<sup>381</sup> Roman law also considered the problem of whether a betrothed woman can commit adultery. A rescript of Severus and Caracalla extended the law on adultery to betrothed women, and from that, Ulpian argued that a girl who lived with a man as his wife, but who was below the age of twelve, and thus below the age of consent to marriage by Roman convention, and who has intercourse with another man, is to be considered betrothed and thus liable for adultery; D. 48.5.14.3, D. 48.5.14.8.

## Law Code of Hammurabi 129

If a man's wife should be seized lying with another male, they shall bind them and throw them into the water; if the wife's master allows his wife to live, then the king shall allow his subject (the other male) to live.<sup>382</sup>

Evidence that this remained the case for a significant period of time is found in the form of marriage contracts from the Neo-Babylonian period, such as the one cited below, which enshrine the right of a husband to kill an adulterous wife.<sup>383</sup>

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<sup>382</sup> LH 153 also touches on the death penalty for an adulterous wife, although in this context the wife has had her husband killed because of her affair, making her both liable for homicide and adultery. Whilst there is no specific legislation for homicide in LH, it is likely that the wife here is doubly liable for a capital sentence as both a murderer and an adulteress. The method of execution here is impalement, which differs from the method in LH 129, and is attested once as the punishment for adultery in a text from Ur, in which both of the adulterous couple were impaled by order of the king; UET 5 203. The circumstances which could give rise to a widow facing this kind of charge may be suggested by a Sumerian homicide trial from the nineteenth century, in which a widow was a co-defendant in the trial despite not actually having taken part in the killing; see Kramer (1956), 58-58; Jacobsen (1970), 193-214. The charge against her was that the three men who carried out the killing told her that they had done it and she did nothing about it. The widow is accused by nine members of the assembly acting as the prosecution of effectively having killed her husband, and according to Roth's reading of the text, they insinuate that due to her silence she may have been in a sexual relationship with the men, and consequently may even have instigated the killing; Roth (1998), 179-180. Westbrook offers an alternate reading in which the prosecution is arguing that the widow did in fact manipulate the men into killing her husband, explaining both why the men told her they had killed him, and why she did not tell anyone about it; Westbrook (2010), 195-199. Whilst this would mean that adultery would not have been considered by the prosecution as a motive for the wife to instigate killing, the trial at least demonstrates how a widow might find herself prosecuted for her husband's killing. Collections of Babylonian omens derived from reading sheep livers also betray an anxiety that an unfaithful wife will have her lover murder her husband; Koch-Westenholz (2000), 105-106.

<sup>383</sup> Roth (1988), 187-188.

### **BM 65149, lines 1-11 – Neo-Babylonian Marriage Contract**

Guizanu voluntarily spoke to Bel-uballit and to Gudadaditu, his mother, as follows: "Please give me Kassa, your daughter (and sister), the lass, in marriage. Let her be my wife." Bel-uballit and Gudadaditu, his mother, agreed to his (proposal), and they gave Kassa, their daughter (and sister), the lass, to him in marriage. Should Kassa be found with another man, she will die by the iron dagger.<sup>384</sup>

Moving outside of Mesopotamia, HL 197 has already been seen in the context of establishing the liability of the wife, but it also demonstrates that adultery was a capital offence in Hittite law. The situation in Israel and Judah will be examined in greater detail below, but for now it is sufficient to mention that both Leviticus and Deuteronomy contain legislation which mandates the death penalty for adultery.<sup>385</sup>

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<sup>384</sup> The inclusion of the clause on adultery is somewhat unusual. It is present in ten of the extant contracts and implies that the husband does not have the right to inflict capital punishment on an adulterous wife in the contracts in which it is not present. No other cuneiform source outside of the Neo-Babylonian marriage contracts reflects anything other than the automatic legal right of the husband to kill an adulterous wife, and it would be unusual if the right did not exist independent of the clause. Roth has suggested that the reason for its inclusion is less to do with the legal rights of the husband, as it is to confirm the status of the woman as a wife; Roth (1988), 205-206. Westbrook that it widens the circumstances in which the wife is liable to the death penalty from specifically caught in the act, to caught with another in a compromising circumstance, though not necessarily in the act; Westbrook (1990), 562-563; and followed by Lafont, S. (1999), 68. Neither scholar questions that the Neo-Babylonian husband would have had the inherent legal right to inflict capital punishment on an adulterous wife regardless of whether the clause was present in the contract or not.

<sup>385</sup> Lev. 18.20; 20.10; Deut. 22.22.

No legislation on adultery survives from Egypt, but legal documents and narrative texts do make mention of it. Adultery is one of a long list of charges made against a priest and a foreman respectively in a pair of New Kingdom period papyri, though unfortunately no punishment is listed.<sup>386</sup> However, adultery is discussed in a variety of literary sources from across a wide span of Egyptian history, and these do provide some insight into the punishment awaiting the adulterous man. In *The Instruction of Ptahhotep*, a collection of maxims which touch on virtue and human relations and which dates to either the Old or Middle Kingdom period, the reader is warned that if he wishes friendship to endure in the houses he enters, then he must beware the women in the house, for death is the penalty for having known them.<sup>387</sup> That adultery remained a capital offence throughout Egyptian history is suggested by another collection of wisdom literature, the *Instructions of 'Onchsheshonqy*, a Demotic text which may be as late as the Ptolemaic period, though is likely a few centuries earlier.<sup>388</sup> Here, the reader is

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<sup>386</sup> P. Turin 1887; P Salt 124. See Eyre (1984), 93-94; Kitchen (1982), 410-411; Theodorides (1981), 18; Vittman (1996), 45-46.

<sup>387</sup> *Instruction of Ptahhotep* 18. The text itself attributes its authorship to a vizier named Ptahhotep who lived under the reign of King Isesi of the Fifth Dynasty of the Old Kingdom. However, the language the text survives in dates to the Middle Kingdom suggesting it may be a later pseudepigraphic composition, either from the Sixth Dynasty, which was the final dynasty of the Old Kingdom, or the Middle Kingdom. See Fontaine (1981), 156; Lichtheim (1973), 6-7; Simpson (2003), 129-130.

<sup>388</sup> The manuscript likely dates to the first century, though a fragment may appear on a manuscript dating to the second century, setting a latest date as the Ptolemaic period, however the composition was most likely earlier. Glanville, who prepared the English translation, favours a date of either the fourth or fifth century; Glanville (1955). See also Smith (1958), 121-122, and (1980), 133-57; Walcot (1962), 15-19; Ryholt (2000), 119-120.

warned to not make love to a married woman, as those who do are killed on her doorstep.<sup>389</sup>

As the passages dealing with adultery in Egyptian wisdom literature are directed at the behaviour of the man, then they give no insight into the fate of the adulterous wife, but some narrative sources suggest that the wife was also liable to the death penalty. In *The Tale of the Two Brothers*, a story from the New Kingdom, the older brother kills his wife and feeds her to his dogs when he discovers she has tried to seduce the younger brother.<sup>390</sup> In *P. Westcar*, which is a collection of tales featuring feats of magic dating to the Middle Kingdom, a scribe who discovered that a man was visiting his house and having an affair with his wife used a wax crocodile to catch the adulterer and present him to Pharaoh for punishment.<sup>391</sup> Both the adulterer and the wife were killed,

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<sup>389</sup> *Instructions of 'Onchsheshongy* 23.6-7. Elsewhere in the text, another form of punishment is presented in which the wife of the adulterous man will have intercourse with others; *Instructions of Onchsheshongy* 21.18-19. It is unclear whether this is intended to be a talionic punishment, in which the man's wife is raped so as to deliver the same offence to the adulterer as was inflicted on the husband, or whether the intended meaning is that the wife of a known adulterer will be inclined to be as unfaithful to her husband as he was to her. If the latter, then no legal punishment is meant by this part of the text. As well as suggesting that Egypt was in line with the rest of the Near East in regarding adultery as a capital offence, the question of the man's knowledge of the woman's marital status is suggested also, much as is found in LU 7 and MAL A 13 and 14. In *Ptahhotep*, the act is envisaged as occurring either in or as a consequence of visiting the husband's home, whilst in *'Onchsheshongy* the adulterer is presented as being killed on the wife's doorstep. As the act is envisaged as taking place in the wife's home, then there can be no doubt that the man knew the woman was married and so was liable to be punished as an adulterer. However, another wisdom text, the *Instruction of Any*, this time from the New Kingdom period, cautions the reader against intercourse with a woman who is a stranger in the town, as she is almost certainly away from her husband, and as such if the reader allows himself to be seduced by her then he will be committing a great capital crime. This stands in contrast with LU 7, where being seduced by the wife away from her home is not an offence for the seduced man.

<sup>390</sup> P. BM 10183 74-75. See Moldenke (1898);

<sup>391</sup> *P. Westcar* 1.18-4.10. See Erman (1927), 36-38.

though little insight into actual punishments can be found with regards to the adulterer, who was devoured by the magical crocodile.<sup>392</sup> The wife, however, was burnt and thrown into the river, which recalls the punishment of a group of unfaithful Egyptian women in a story told by Herodotus.<sup>393</sup> Execution by fire is attested in ancient Egypt as a punishment for treason, suggesting that if the punishments in *P. Westcar* and Herodotus have any basis in actual practice, then in Egypt, adultery may have been tantamount to treasonous behaviour by the wife towards her husband.<sup>394</sup>

Returning to Mesopotamia, MAL A 15 deals with the requirement of proving the guilt of the adulterous couple before they can be punished, but due to its ambiguous wording, the exact situation it is envisaging is unclear. As a result, there have been several different interpretations of the passage in modern scholarship. Here is Roth's translation of the passage:

#### **MAL A 15**

If a man should seize another man upon his wife and they prove charges against him and find him guilty, they shall kill both of them; there is no liability for him (i.e., the husband). If he should seize him and bring him either before the king or the judges, and they prove the charges

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<sup>392</sup> *P. Westcar* 4.6-7.

<sup>393</sup> Hdt. 2.111.

<sup>394</sup> Cremation would prevent the corpse from being embalmed, and burning the body denied the victim access to the afterlife, thus it was reserved for the most heinous crimes; Sander-Hansen (1942), 10; Leahy (1984), 199-206, who also gives a number of examples of death by fire as a punishment for treason. See also Lloyd (1988), 41.

against him and find him guilty – if the woman’s husband kills his wife, then he shall also kill the man; if he cuts off his wife’s nose, he shall turn the man into a eunuch and they shall lacerate his entire face; but if [he wishes to release] his wife, he shall [release] the man.

By this reading, MAL A 15 presents two alternative procedures for imposing a penalty upon the couple; one in which they are dealt with on the spot, and the other in which they are brought to a formal trial. The phrase ‘*ubta’eruš ukta’inuš*’ used in both sections, and it is the main source of ambiguity in the text as its meaning is unclear. It is translated by Roth as ‘prove charges against him and find him guilty’, but objections to this translation are noted by both Driver and Miles, pre-emptively, and by Westbrook, on the grounds that the charges would be proven by the witnesses and/or the accuser, whilst the conviction would come from the court, but there is no indication of a change in subject for this phrase.<sup>395</sup>

Driver and Miles take the phrase to mean making an accusation and bringing sufficient evidence to support it.<sup>396</sup> Consequently, in the first part of MAL A 15, they see some form of informal trial procedure as first being necessary before the husband can kill the couple, as this would both be necessary for the killing of a free man and would safeguard the position of the husband and anyone else who takes part

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<sup>395</sup> Driver and Miles (1935), 342; Westbrook (2003a), 88.

<sup>396</sup> Driver and Miles (1935), 342.

in applying the punishment.<sup>397</sup> For Cardascia, this procedure is a gathering of witnesses prior to the execution to both protect the husband from an accusation of homicide, and the couple from summary execution without first proving their guilt.<sup>398</sup>

Westbrook initially took issue with this on the grounds that, based on its use elsewhere in MAL, *ubta'erus ukta'inuš* implied a formal trial, which would render the second part of MAL A 15 redundant.<sup>399</sup> As an alternative, he argued that rather than some form of trial occurring before the husband can inflict the death penalty, the first part of this law dealt with a situation in which the husband had caught the couple in the act, summarily executed them on the spot, and is now the defendant in a homicide trial.<sup>400</sup> Later, however, Westbrook abandoned this argument as he reinterpreted the wording to mean both rational and supra-rational burdens of proof respectively.<sup>401</sup> By this interpretation, the term refers to the court considering the material evidence first, finding it to be in favour of the accuser's case though not sufficient to win the case, and so they allow the accuser to undertake an ordeal, or more likely, to swear an oath, which if done so, decides the case in the accuser's favour.<sup>402</sup> This would mean MAL A 15 is not for circumstances in which the couple are irrefutably caught in the act, as that would mean the rational evidence is sufficient on its own, but

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<sup>397</sup> Driver and Miles (1935), 45-46.

<sup>398</sup> Cardascia (1969), 121.

<sup>399</sup> Westbrook (1990), 553.

<sup>400</sup> Westbrook (1990), 553.

<sup>401</sup> Westbrook (2003a), 87-97.

<sup>402</sup> Westbrook (2003a), 88.



rather when they are caught in a compromising situation, one which indicates adultery, but does not definitively prove it.<sup>403</sup> Instead, the compromising situation reaches the threshold of rational evidence that the court would require for them to allow the husband to win the case by swearing an oath.

The problem with this reading is the oath is superfluous as it duplicates the rational evidence. In the reconstruction which Westbrook presents, the husband has found the couple in a situation which is compromising without being definitive, gathered witnesses who can testify that the couple were found in this situation, and then the husband has an oath imposed on him to swear what the witness testimony already proves. In the first part of the law, it would mean that the husband gathered witnesses to the compromising situation, and they in turn imposed an oath on the husband to swear that the couple are in a compromising situation that they themselves have witnessed. As Westbrook's reading of the phrase depends upon the rational evidence falling short of being compelling enough to prove the accuser's claim, the accuser's claim

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<sup>403</sup> Westbrook places great emphasis on the use of *ištu aššatišu*, 'with his wife', to argue that MAL A 15 is specifically regarding a situation in which there is some proof, but not definite proof, else 'upon' would be the term used; Westbrook (2003a), 96. See also Lafont for a similar interpretation, in support of her reading of the Neo-Babylonian marriage contract's adultery clause; Lafont, S. (1999), 67-68. Driver and Miles recognise that by using 'with', the law is considering situations beyond those in which the adulterous couple are unquestionably caught in the act, but dismiss the distinction as unimportant, as if the situation was sufficiently compromising, it would be tantamount to being undisputedly caught in the act; Driver and Miles (1935), 48. Roth effectively follows this by smoothing over the distinction and translating 'with' as 'upon'. If the use here of 'with' is intended to broaden the circumstances in which the couple are liable to punishment as adulterers, then barring the specific example of the witness testimony falling short of the husband's claim, then Driver and Miles must be correct.

must go beyond what can be proven by the rational evidence. The situation would need to be the much narrower circumstance in which the husband had definitively caught them in the act, but by the time witnesses were gathered, the situation had become merely compromising.<sup>404</sup> Thus, the witness testimony could meet Westbrook's standard for the court to then make up the gap by imposing the oath. Otherwise, if MAL A 15 does cover sufficiently compromising situations, then these must have been *de facto* considered to be same as being caught in the act, and so there would be no need for an oath.

Another interpretation is offered by Stol, who does not see two separate procedures in MAL A 15, but rather a two-stage process in which the husband first discovers the adulterous couple, this leads to others discovering the adultery, and then the couple are brought to face

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<sup>404</sup> Westbrook calls upon a comparison with G.72.2.20-45 from the Gortyn Law Code to help make his argument; Westbrook (2003a), 96-97. Here, the adulterer, or more accurately the *moichos*, has been caught in the house of his lover's *kurios* and is being held for ransom. The accuser makes his request for the ransom in front of three witnesses, but these are not witnesses to the circumstances of the capture, rather to the request for the ransom. When the accuser swears an oath here it is to confirm in front of witnesses that he did catch the *moichos* in the act, and he did not entrap him, as is claimed by the *moichos*. However, and as Westbrook notes, there was no need for the Assyrian husband to swear an oath to this as MAL A 15 introduces a check on his ability to entrap the adulterer by forcing him to punish his wife also, which is not the case in Gortyn. Westbrook explains this away by splitting the Gortyn oath into two parts; an accusatory oath that he caught the *moichos* in the act, and an exculpatory oath that he did not entrap him. The requirement in MAL A 15 of equal punishment removes the latter part, leaving just the accusatory oath for the Assyrian husband to swear. This is a problematic reading as the Gortyn oath is only sworn if the accused defends himself by claiming to have been entrapped. If the requirement of equal punishment is sufficient to disprove entrapment, there is no need for an accusatory oath to state the intercourse was adultery and not entrapment. The Assyrian husband proves there was no entrapment, and that adultery did occur, by punishing his wife. The circumstances which make the oath necessary in Gortyn would be again superfluous in MAL A 15.

justice.<sup>405</sup> However, *ubta'erus ukta'inuś* appears in both sections of the law, suggesting the first part of the law is envisaging a situation in which the husband discovers the couple, their guilt is proven in some way with a punishment administered without reference to a court, and the circumstances in which the husband has no liability for this punishment.<sup>406</sup> Meanwhile, the second part is envisaging an alternative situation in which the couple are brought to a trial, their guilt is proved there, and they are punished. There is no need to reference the husband's liability for any punishment in the second part as the charge has been proven in a formal trial, and instead in its place are the range of punishments the court allows the husband to choose from.

That witnesses were necessary to secure an adultery conviction or protect a husband from a charge stemming from administering an on the spot punishment seems undeniable. A text from Mari records a merchant who caught his wife in bed with another man. The merchant tied the couple with ropes and brought them out so that others could see them and thus enable him to call upon them as witnesses when he brought the case to the official who wrote the text.<sup>407</sup> Likewise, a Sumerian husband did the same thing when he caught his wife in bed with another man.<sup>408</sup> Whilst not specifically in the context of adultery, Deut. 17.6 not only requires witnesses to prove any capital charge, but

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<sup>405</sup> Stol (2016); 242.

<sup>406</sup> Stol translates *ubta'erus ukta'inuś* as 'show that he was the one, (and) can prove it', which is in line with an understanding of the phrase as one which simply means being able to prove the guilt of the couple; Stol (2016), 242.

<sup>407</sup> LAPO 18 1064; Durand (1988), 524-525.

<sup>408</sup> Greengus (1969-1970), 34-35.

there must be at least two of them, and no-one can be put to death on the evidence of only one witness. It seems highly likely that both sections of MAL A 15 are dependent on witness testimony to prove the charge, and that if the husband wishes to inflict an immediate punishment upon discovering the couple, he must first gather witnesses to ensure the charge can be proven if he is to be absolved of any liability for his actions. These witnesses must be able to testify that the situation in which the couple were caught was in fact adultery, or perhaps a situation tantamount to adultery, which in effect would be the same thing.

Leaving aside the issue of what exactly is envisaged by MAL A 15, it also demonstrates that whilst adultery was a capital crime, the husband had other options available for punishing the couple. Here, he can choose either to kill the couple, to mutilate them, or to set them free without any punishment. As has already been seen, LH 129 also allows for setting the couple free, albeit not explicitly for any punishment other than death if the husband did wish to impose one. A similar situation is found in the Hittite Laws:

#### **HL 198**

If he brings them (the adulterous couple) to the palace gate (i.e., the royal court) and says: “My wife shall not die,” he can spare his wife’s life, but he must also spare the lover and ‘clothe his head’, If he says,

“Both of them shall die,” they shall ‘roll the wheel’. The king may have them killed or he may spare them.<sup>409</sup>

When considered along with the preceding law at HL 197, it seems as if the situation for the Hittite husband was the same as presented to the Assyrian husband in MAL A 15, as he could either kill the adulterous couple on the spot without liability if he caught them in the act, or he could bring them to trial to first secure a conviction for adultery. In addition to this, and uniquely amongst all surviving Near Eastern legislation on adultery, the Hittite Laws also allow for the king to override the decision of the husband and either kill or spare the couple.<sup>410</sup>

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<sup>409</sup> The meaning of ‘clothe his head’ and ‘roll the wheel’ is not known; Roth (1995), 237, 240 n. 65, 66.

<sup>410</sup> The Hittite king is also presented at HL 187 and 188 as having the power to execute or pardon a defendant. Westbrook, consequently, ties the king’s right of punishment in adultery cases to this as an inherent right which exists independently of adultery law; Westbrook (1990), 555. However, in HL 187 and 188, which deal with cases of bestiality, the defendant is always presented to the king for punishment, and it is not the case that the right of punishment exists with the victim in the first instance, with the king being granted the right to overrule his decision. The Hittite Laws do not deal with premeditated homicide of an ordinary person, but this offence is dealt with in another Hittite document, the *Telipinu Proclamation*. In this, the wishes of the next of kin are made paramount. It is they who get to choose whether the defendant is to be killed or has to pay compensation, with the king specifically excluded from having any role; TP 49. Whilst this is not located in the Hittite Laws themselves, it is issued by King Telipinu, to whom Roth attributes the Main Version of the Hittite Laws, and it complements them by providing legislation not found in them; Roth (1995), 214. Although Westbrook does make specific reference to the Hittite Laws only, it undermines the argument that the right of the king to overrule the husband in HL 198 is an independent right of the Hittite king in all cases, and it gives a unique surviving instance of the state specifically intervening in the rights of the husband in Near Eastern adultery law.

Mutilation, humiliation, and divorce are all found as punishments for adultery in the case of the previously mentioned Sumerian husband, who tied his wife and her lover to the bed so they could be presented to a court.<sup>411</sup> No punishment is mentioned for the adulterer, but the wife had her genitals shaved, an arrow bored through her nose, and was led, presumably naked, around the city.<sup>412</sup> The text recalls MAL A 15 in the manner in which the couple are seized by the husband and brought in front of the king for trial, and in the mutilation of the wife's nose. The wife is also divorced, and the husband is in some way not required to return some or all of the dowry he would have received when marrying her.<sup>413</sup> A similar provision is also found in Egyptian marriage contracts which survive from the early Demotic period, and which state that if the wife is found guilty of initiating adultery and is consequently

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<sup>411</sup> See Greengus (1969-1970), 33-44; Lafont, S. (1999), 37-41; Neumann (2004), 85-88. Adultery is the last of three accusations made by the husband against the wife. The others are stealing from him and breaching his oil jar. These collectively are intended to demonstrate that the woman is a bad wife, cumulating in the most serious offence against a husband, the adultery; Roth (1998), 180-181.

<sup>412</sup> By drawing on a text from Mari for a different offence, and Ezek. 16.39-40, Lafont suggests that these punishments could have been the preliminary to an execution by public lynching, or possibly that she could have been killed by the crowd during her procession through the city without incurring any liability for homicide; Lafont, S. (1999), 40-41. The Mari text does suggest that the physical punishment inflicted during the procession could be severe, as the man there had his ears cut off, was partially flayed, and was led around the city thirty times until he died; ARM 26 434. It is difficult to know whether or not a similar fate for the wife in this case is implied by the judgement against her, though the mention of divorce money may suggest it was not.

<sup>413</sup> Greengus allows for this either being a payment to the husband by the wife, or a non-payment that the husband would otherwise have been liable for when initiating a divorce; Greengus (1969-70), 39. In either instance, the source of the payment likely derives from the wife's dowry and so effectively is the same thing. See LH 141-142, in which a husband can divorce a bad wife without paying her, and a wife can divorce a bad husband and take all of her dowry with her. Although adultery is not mentioned here, Westbrook argues that if the husband chose to divorce his adulterous wife, then this would be covered, and he would not have to pay compensation; Westbrook (1988a), 77.

divorced by her husband, she loses the right to reclaim her dowry.<sup>414</sup>

Another Sumerian text from the end of the third millennium also records a wife who was divorced for adultery, and a text from Mari may also record a husband divorcing his adulterous wife.<sup>415</sup>

From late in the second millennium, a series of royal texts from Ugarit record a divorce between King ‘Ammittamru and an Amurrite princess

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<sup>414</sup> Pestman (1961), 56. That similar evidence does not exist for earlier periods does not mean that the same right did not exist for the husband throughout Egyptian history, but rather is likely just a consequence of the fact that documents of this type were not in use in earlier periods to record this information; see Allam (1981) 117, who argues in this context that marriage is a conservative institution which changes little over time. A similar, if slightly less severe, provision for retention of dowry is found in Roman legislation. There, if the wife was at fault for the divorce then the husband could retain one-sixth the value of the dowry per child the couple had up to a maximum of half, and if the fault was adultery on the wife’s part, then a further one-sixth could be retained on the grounds of serious immorality. Conversely, if adultery on the husband’s part was the cause of the divorce, the wife could only speed up the process by which she recovered her dowry; Ulp. 6.9-10, 12-13.

<sup>415</sup> NG 205:18-26, and see Lafont, S. (1999), 268, for the Sumerian text. For the Mari text see Durand (2000), 239. In the latter instance, the meaning depends upon the reconstruction and translation of *le-em-ma* by Durand, which is preserved in line 22 and reconstructed by Durand in line 25. In his first reconstruction of the text, Durand translated these as ‘ascend’, and argued that the adulterous couple undertook a river ordeal and survived; Durand (1988), 524-525. Later, he retranslated these lines to argue that the husband was repudiating his wife; Durand (2000), 239-240. If the first attempt is correct, then this would provide a unique instance of an accused man undertaking a river ordeal for adultery. This ordeal is usually reserved in Mesopotamia for a wife accused of adultery, but where there is no proof, (see the section on Oaths and Ordeals below). Here, the couple had been caught in the act by the husband with witnesses, and it seems beyond question that they were involved in a sexual relationship. Durand addressed this by suggesting that the wife offered the defence that the intercourse was not consensual, whilst the lover offered the defence that he did not know she was married, causing the official deciding the case sufficient doubt as to refer it to the river god. This is a problematic argument as both of those defences are addressed in Near Eastern legislation and dismissed depending on the location of the act; see LU 7, MAL A 13, 14, HL 197, Deut. 22.23-27. The location here is not clear, but it was both somewhere the husband could walk in on it unexpectedly, and then quickly gather witnesses, which would at least undermine any defence by the wife that the intercourse was not consensual. Given that, and the usual use of the river ordeal as a procedure for a wife accused without proof, then the second translation of Durand that the husband repudiated his wife is much to be preferred. This repudiation would seem likely to have comprised of the husband divorcing the wife for her adultery.

for adultery.<sup>416</sup> Here, the king initially appeared to accept a simple divorce with no further penalty, possibly under some diplomatic pressure from the Hittite emperor.<sup>417</sup> In this instance, the adulterous wife retained her dowry, but she was required to leave behind any possessions she had acquired whilst in Ugarit.<sup>418</sup> The king then later seems to have changed his mind and requested his errant ex-wife be returned to him by her brother, the king of Amurru, to be executed.<sup>419</sup> As a dynastic marriage, the circumstances surrounding the wife's punishment may not truly reflect how most cases of adultery would have played out, but in presenting both divorce and the death penalty as options, the punishments are consistent, and they also appear to be largely at the discretion of the husband, diplomatic pressure notwithstanding.

As previously mentioned, the adultery legislation found in the Hebrew Bible is in line with the rest of the Near East in the respect that it presents adultery as a capital offence. There are two separate strands of legal material in the Hebrew Bible for adultery, one from the Priestly source and the other in Deuteronomy:

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<sup>416</sup> RS 17.159 Following Márquez Rowe that the 'great sin' committed by the wife was adultery rather than a political conspiracy, both of which have attestations of the use of the term elsewhere. See Márquez Rowe (2000), 368-372.

<sup>417</sup> RS. 17.116; Márquez Rowe (2000), 366-367.

<sup>418</sup> RS 11.12-16, 17.396.

<sup>419</sup> Márquez Rowe (2000), 367.



### **Lev 18.20; 20.10**

You shall not have sexual relations with your kinsman's wife, and defile yourself with her.

If a man commits adultery with the wife of his neighbour, both the adulterer and the adulteress shall be put to death.

### **Deut. 22.22**

If a man is caught lying with the wife of another man, both of them shall die, the man who lay with the woman as well as the woman. So you shall purge the evil from Israel.

The Leviticus passage is placed within a longer section of legislation given by God, and includes crimes such as sorcery, incest, bestiality, and the eating of unclean animals.<sup>420</sup> Failure to follow any of these laws is an offense against God, meaning Leviticus presents adultery not as an offence to the husband, who is not mentioned, but as an offence against God.<sup>421</sup> If the Israelites do not adequately deal with the adulterous couple, then they risk their relationship with God, and their occupancy of the land granted to them by God.<sup>422</sup> Adultery was regarded by the Priestly source as an offence to God of such seriousness

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<sup>420</sup> Lev. 20.1-27.

<sup>421</sup> Lev. 20.22.

<sup>422</sup> Lev. 20.22-23.

that it lists a prohibition against adultery as one of the Ten Commandments.<sup>423</sup>

Deuteronomy also presents its adultery legislation in the context of a much broader set of legislation given to Moses by God. The concerns of the Deuteronomist are slightly different to the Priestly source, in that it does not have the same conception of the relationship between the land and the people, but rather couches its theological outlook in terms of the people. Failure to observe any of God's commandments risks bringing evil into the midst of the people, and ultimately this too risks the relationship between the Israelites and God.<sup>424</sup> As with Leviticus, adultery is not presented here as an offence to the husband, who again is not mentioned, but rather as an offence to God.

The manner in which adultery is envisaged in these passages as an offence to God, with no mention of the husband, nor any mention of a lesser punishment which can be imposed on the couple at the husband's discretion, has led many scholars to regard adultery law in Israel and Judah as being distinct from that found elsewhere in the Near East.<sup>425</sup>

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<sup>423</sup> Exod. 20.14.

<sup>424</sup> Deut. 28.15.

<sup>425</sup> Stol argues that adultery legislation which mandates the death penalty is found in LE 28, noting that the phrase 'she shall die, she shall not live', means that the adulteress there is to be killed, with no opportunity for the husband to impose a lesser punishment; Stol (2016), 245. As this law is dealing with the marital status of the woman, rather than adultery, Westbrook argues that LE 28 is not concerned with the finer details of punishment for adultery, much as other laws which do deal with adultery do not concern themselves with whether the woman is to be considered a wife; Westbrook (1990), 553-544. Similarly, MAL A 13 only makes mention of the death penalty as the punishment for adultery, but is a law concerned with whether the man knew the woman was married. If he did, the he is liable and must be killed. It does not need to go into any further detail than that, and a different law, MAL A 15, deals specifically with the husband's right to impose a punishment. Further support for Westbrook is found

Given that this approach to adultery legislation is couched in theological concerns around the relationship of God to the people, it is understandable that the Hebrew Bible prioritises the concerns of God above the concerns of the husband. However, as these texts are first and foremost theological compositions, which present their legislation from a theological perspective, rather than an actual collection of laws, there is room for significant doubt that in their insistence that the adulterous couple must be killed they are reflecting actual practice in Israel or Judah. Support for a more traditional Near Eastern approach which prioritises the rights of the husband and which allows him to set the level of punishment can be found in Prov. 6:

**Prov. 6.32-35**

But he who commits adultery has no sense;

he who does it destroys himself.

He will get wounds and dishonour,

and his disgrace will not be wiped away.

For jealousy arouses a husband's fury,

and he shows no restraint when he takes revenge.

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in Yaron's observation that LE often omits detail from the apodosis in comparison with other Near Eastern law codes; Yaron (1969), 56. In the case of LE 28, if the details mentioned encompass the entirety of the legislation on adultery, then it would also mean that there was no punishment at all for the adulterous man, as only punishment for the wife is mentioned. Whilst the absence of a law such as MAL A 15 in LE means it could be the case that a local variation is found at Eshnunna, and it did differ from its neighbours in mandating the death penalty for at least one of the adulterous couple, the context is still one of family law, and the rights of the husband, as opposed to that of Leviticus and Deuteronomy and its depiction of adultery as an offence to God.

He will accept no compensation,  
and refuses a bribe no matter how great.

There are two elements in this passage which indicate that the death penalty was not automatically applied to an adultery, and that the husband did have significant discretion in applying any punishment. The first is found in the final two lines, which indicate that legal compensation from the adulterer may have been an option open to the husband. These two lines can be interpreted in different ways, depending on how *kopher* and *shochad* are to be translated. The NRSV translation given above translates them as ‘compensation’ and ‘bribe’, respectively. They could refer to a payment that the husband has the legal right to take in lieu of imposing the death penalty, or they could refer to an attempt by the adulterer to bribe his way out of the mandated punishment. The exact legal situation the passage presents changes depending on which it is, as in the former it would be presenting a one in line with the rest of the Near East, in which the husband has the right to set the level of punishment, whereas the latter supports the presentation of adultery in Leviticus and Deuteronomy as an offence for which the adulterer must be executed if caught.

There is support for both readings elsewhere in the Hebrew Bible. In the vision of Judah and Jerusalem seen by Isaiah, *shochad* is used to unmistakably mean a bribe at Is. 1.23, to describe the corruption in Jerusalem. In 1 Sam. 12.3, Samuel uses *kopher* to mean payments taken by an official to turn a blind eye. Conversely, Exod. 21.30 uses

*kopher* to mean the money that the owner of a goring ox must pay, and which is certainly used in the sense of legally mandated compensation. *Shochad* is more commonly used to mean a bribe, such as at 1 Sam. 8.3 and Is. 1.23, though there are uses of it in 1 Kgs. 15.19 and 2 Kgs. 16.8 to mean a gift given between kings to cement an alliance. However, whilst there are no negative connotations in the use of *shochad* in this passage to mean a bribe, nor is it a payment of compensation either. Given that, it seems unlikely that compensation which can legally be demanded by the husband is meant by its use in Prov. 6.35, and bribe is more likely to be the meaning. With the clear meaning of *kopher* as legal compensation in Exod. 21.30, the most likely reading is that *kopher* is being used to refer to the legal compensation that the husband was entitled to ask for instead of imposing the death penalty, and which in this instance he refuses to do, and *shochad* is being used to refer to the attempt of an adulterer caught in the act to buy his way out of the situation, which the husband refuses to accept.<sup>426</sup> That it is only the

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<sup>426</sup> Westbrook prefers to see both of these terms as referring to legal compensation due to the gift-giving use of *shochad* in 1 Kgs. 15.19 and 2 Kgs. 16.8; Westbrook (1990), 545-546. To do so he calls upon these instances as representations of international law, and from there can be extrapolated the term as one used for legal payments. This stretches the use of the word further than seems warranted. In both instances, the word is used to describe a gift of silver and gold sent by one king to another to buy their aid in a war. Whilst not an outright bribe, it carries connotations of a payment offered with the intention of receiving something in return. When used in 1 Sam. 8.3, its meaning is that of a payment offered to a judge to pervert justice, suggesting that a punishment which should be administered is bought off by the *shochad*. It is thus difficult to read its use in Prov. 6.35 as anything other than an attempt by the adulterer to buy off the husband to prevent any physical punishment being imposed. Further, if both words mean legal compensation then 6.35 repeats itself in both clauses as 'He will not accept any compensation, and he will not accept compensation no matter how great'. For Phillips, the use of *shochad* alongside *kopher* is proof that the latter does not have the intended meaning of legal compensation, given that the former does not have this meaning; Phillips (1981), 18. Whilst he is on firmer ground than Westbrook in asserting one of the words definitely means a bribe,

*shochad* which the passage envisages as having the potential to be a substantial sum offered by the adulterer further suggests that it is a bribe, and the *kopher* is a set payment.

The second element is found at 6.33, where the adulterer is described as receiving *nega*’, which is translated in the passage as ‘wounds’. The word has connotations of physical contact and is used at Deut. 17.8 in a trial context to mean assault, and at 2 Sam. 7.14 to refer to a beating given with a rod. It carries no connotations of killing, however, so the recipient of the *nega*’ in this verse is not necessarily presented as being killed by the husband, but rather as receiving another physical punishment which is likely a severe beating, but which stops short of killing. Nor is it a beating handed out in a judicial context, as may be expected if adultery is not an offence to the husband, but one delivered on the spot by the husband, suggesting it was something he had the right to do.<sup>427</sup> It should be noted that the preceding verse does suggest that the adulterer is killed by the husband. Here, the root *sh-ch-t* is used in the *hiphil* to refer to the adulterer destroying himself. The same verb is used in the *piel* at 2 Sam. 14.11 to refer to a man facing the death penalty for homicide, and at Num. 32.15 to refer to the destruction of the Israelites if their behaviour causes God to abandon them in the wilderness. The juxtaposition of the two verses next to each other could

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he meets the same problem of repetition, in that the husband by this reading will neither accept a bribe nor accept a bribe. As *kopher* has a definite meaning of legal compensation, and as Westbrook points out its context as a bribe is when it is offered to an official, whilst when offered to a litigant it is compensation, then a reading of ‘He will not accept any compensation, and he will not accept a bribe no matter how great’ is to be preferred.

<sup>427</sup> *Makkot* is used at Deut. 25.3 for when a beating is imposed by a judiciary.

be read to say that the destruction the adulterer brings upon himself is his death caused by the beating he receives from the husband, though as *nega*’ is specifically assault or a beating with no inherent connotation that the victim is killed suggests that it is a simple beating which is being envisaged in 6.33.<sup>428</sup>

The situation presented in Prov. 6.32-35 is that of a husband who catches his wife committing adultery with another man, and in his fury, decides to exercise his right to impose a physical punishment on the adulterer on the spot. He has the right to demand a compensatory payment but chooses not to. He may or may not be envisaged as killing the adulterer but does seem at least to be allowed to administer a beating, and that the adulterer can be killed certainly seems to be allowed for. The adultery legislation found in Leviticus and Deuteronomy imposes a theologically motivated mandate of the death penalty for an adulterer, whose offence is one committed against God, and which if left unpunished by his death risks the relationship of the Israelites to God. Consequently, it does not allow for the discretion of the husband, and nor does it make the wishes of the husband paramount over the Israelites’ relationship with God.<sup>429</sup> That the adulterer could

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<sup>428</sup> An alternative explanation for the juxtaposition of the adulterer’s destruction in 6.32 and beating in 6.33 is offered by Fox, who sees the destruction not as representing the immediate death of the adulterer, but that the adulterer has put himself on the path to death by his actions; Fox (2000), 235.

<sup>429</sup> It should also be noted that nor is it only in the Hebrew Bible that adultery is couched in terms of the crime being an offence to a deity. It is listed as a sin against Ninurta in a Middle Assyrian hymn to that god, whilst in Šurpu, Tablet II, adulterers are listed amongst sinners who are punished by the gods, and by Marduk in particular in Tablet IV; Lambert (1960), 119. The declaration of innocence given to a council of 42 gods in Spell 125 of the Egyptian *Book of the Dead*, includes the denial ‘I am not an adulterer’ (trans. Naville). Loewenstamm

be subject to the death sentence seems beyond dispute, and is in line with the rest of the Near East, but this passage strongly suggests that in reality, the rights of the Hebrew husband were the same as they were elsewhere in the Near East.<sup>430</sup>

The Hebrew Bible also contains one of the most famous accounts of an adulterous relationship in the ancient world, that of David and Bathsheba in 2 Sam. 11.2-12.19.<sup>431</sup> Here too, the narrative account strongly suggests that the offence was primarily conceived of as one against the husband, and of which the husband's interests were

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argues that in Mesopotamia, both the gods and the courts had separate jurisdictions in punishing the adulterer, with the court's interest being in upholding the rights of the husband rather than carrying out the will of a god, and that this distinction also is found in the Hebrew Bible when Prov. 6 is considered alongside the Pentateuchal legislation; Loewenstamm (1980), 147-149.

<sup>430</sup> Loewenstamm sees no contradiction between Prov. 6 and the passages in Leviticus and Deuteronomy on the grounds that in all cases, the task of prosecuting adultery would fall to the husband, and not on any third party whose interest would be avenging the affront against God. For Loewenstamm, the legislation in the Pentateuch is primarily intended to drive home the seriousness of the offence. However, other Near Eastern legislation does allow for alternative punishments, such as MAL A 14, 15 and HL 198, and even where it does not, such as LU 7 and MAL A 13, there is no suggestion that death is the only acceptable penalty. This is not the case with Leviticus and Deuteronomy, for which only the death of the adulterer will maintain the relationship of the Israelites with the land and with God. Objections to the understanding of Prov. 6 as being representative of any actual legal practice in Israel have been raised by several scholars. Weinfeld argues that this proverb is couched terms of an instruction in correct behaviour to a young person, and so it represents didactic-secular teaching only rather than any legal practice; see Weinfeld quoted in Loewenstamm (1980), 172. This viewpoint is problematic, as it would rely on the punishment meted out by the husband in 6.32-35 as having no basis in any legal sanction. If this were the case, then it would undermine the passage's ability to serve as teaching, as in reality, an adulterer would not be subject to this punishment. Greenberg argues that the passage does not reflect any actual legal practice on the grounds that the use of *nqm* means a vengeance taken by the husband outside of any legal framework, and so the payments mentioned in 6.34-35 cannot be legal compensation; Greenberg (1986), 4; see also Greenberg (1983), 13. However, see Westbrook (1988b), 89-100 for a survey of the use of *nqm* in the Hebrew Bible to show that in a legal context it can refer to a fixed payment.

<sup>431</sup> Galpaz-Feller (2004), 153.



paramount. David began the affair whilst her husband, Uriah, was away with the army. Then, after Bathsheba fell pregnant, David arranged to have Uriah killed in battle and he brought Bathsheba to his house to live with him as his wife.<sup>432</sup> David is punished for his deeds, but not by his or Bathsheba's death, and not by Uriah nor any secular authority. Instead, it is God who punishes him by causing the child born as a result of the adulterous affair to be struck down by illness. Despite this, David's main concern throughout the affair is not that he risks divine punishment, but that Uriah not discover what has occurred, and that he not question the paternity of the child.<sup>433</sup> When David is not successful at manipulating Uriah into going home and lying with Bathsheba so that he subsequently will believe the child is his, it is then that he arranges Uriah's death as a last resort, so important is it to him that Uriah not find out what has happened. It is only after this that God intervenes to punish David, and the main charge is not so much that he has committed adultery, but that he has taken a wife from Uriah when he already has many wives, and that he had Uriah killed.<sup>434</sup> It is clear from the passage that David regards his adultery primarily as an offence against Uriah, and it is only when Uriah is dead and cannot

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<sup>432</sup> Pregnancy in the absence of the husband is also taken as proof of sexual infidelity in Gen. 38.12-26, where Tamar falls pregnant whilst she is a widow and effectively betrothed to her brother-in-law.

<sup>433</sup> A set of Old Babylonian omens on pregnancy resulting from adulterous affairs include one in which the wife prays to Ishtar to make her child look like her husband; Stol (2000), 103.

<sup>434</sup> Janzen also notes that the punishment David receives is not for the adultery, but instead because God has given him much, including wives, and could have given him much more, but he took a wife that God did not give him. In doing so, he has despised God by assuming God's role. See Janzen (2012), 209-220.

exercise his rights as Bathsheba's husband against David that God intervenes.<sup>435</sup>

The books of the Hebrew prophets often use adultery as a metaphor for the Israelites' unfaithfulness towards God. As they are narrative sources which do not directly touch on the subject, their usefulness for reconstructing adultery law is certainly limited, but as the metaphor can only work if it in some way reflects actual practice, they also help to demonstrate that not only was it the case that the husband did have discretion in how his adulterous wife was to be punished, but that these punishments were also in the line with the remainder of the Near East. The husband of Hos. 2-3 divorces his adulterous wife and humiliates her by stripping her naked, the adulterous wives of Ezek. 16.38-39 are also publicly stripped naked, and the fall of Israel is envisaged as a wife who has been divorced by her husband for adultery in Jer. 3.8.<sup>436</sup> Stripping naked is also a punishment mentioned several times in the Hebrew Bible for prostitution, meaning the adulterous wife in these passages was seen as comparable to a prostitute.<sup>437</sup>

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<sup>435</sup> As Anderson points out, David's actions in attempting to conceal the affair from Uriah only make sense if the right of bringing a charge of adultery fell to the husband alone, and not to the community; Anderson (1989), 156.

<sup>436</sup> Phillips sees these as punishments which were available to the husband prior to Deuteronomy and its reforms, after which the punishment became death; Phillips (1973), 352-354. Even if this is correct, then it would mean that for a significant portion of Israelite history, the punishments would have been in line with the remainder of the Near East. However, Prov. 6 strongly suggests that it is not.

<sup>437</sup> Jer. 12.26-27; Ezek. 16.37-38, 23.10, 29; Hos. 2.5; Nah. 3.5. An eighth-century Aramaic treaty inscription from Sefire in northern Syria may also record stripping as a punishment for prostitution. The treaty records a punishment for one of the parties involving his wives, daughters-in-law, and the wives of his nobles being stripped if he breaks the treaty and depending on the reconstruction of the text

The cumulative picture built up by this survey of the evidence suggests that death, mutilation, financial compensation, divorce with retention of at least some of the dowry, and even no punishment at all were all options available to the wronged husband across the Near East. Only in the Hebrew Bible is any attempt made to deny the husband any discretion in the manner of the punishment, but even here it seems as if the husband still retained these rights, and as McKeating has pointed out, there is no example in Biblical literature of anyone being put to death for adultery.<sup>438</sup> This contrast between laws which cite a capital punishment and actual instances of it being applied for the offence is also found elsewhere in the Near East, as LH frequently imposes the death penalty in its legislation, but in practice it appears that a lesser punishment was usually applied.<sup>439</sup> This, coupled with the adultery divorce clauses in Demotic marriage contracts, documented divorces in Sumerian and Ugaritic texts, plus mutilation and humiliation also in Sumerian texts, suggests that whilst the husband could impose the death penalty, in practice it may rarely have actually happened.<sup>440</sup>

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their punishment may be that of a prostitute's. See *Sf I A 40-41*; Hillers (1964), 58-60; Fitzmyer (1967), 15, 57.

<sup>438</sup> McKeating (1979), 58.

<sup>439</sup> See Westbrook and Wilcke (1974/1977), 118-119, for a discussion of lesser punishments handed out for theft.

<sup>440</sup> In part due to the lack of legal evidence documenting the execution of an adulterer by the courts, Lorton goes as far as to argue that whilst summary execution was available to the husband in Egypt, the death penalty for adultery was not an option in the Egyptian courts. He explains the judgement of the pharaoh against the adulterous couple of *P. Westcar* as being branding for the wife and burial for the adulterer whom is already dead at the hands of the husband. In other literature, death either comes at the hand of the husband, and/or other crimes are involved in addition to adultery. However, and as has been seen, other Near Eastern societies very definitely allowed for the courts to consider adultery as a capital offence, even though actual instances of this penalty being carried out may be lacking. Lorton's argument also raises the

## Oaths and Ordeals

As has already been seen in the likes of LH 129, MAL A 15, and HL 197, an adulterous man was liable to sanction by the husband if he was caught in the act.<sup>441</sup> In the absence of any clear evidence as to his guilt, there was no provision for the husband to take any action against him.<sup>442</sup> For the wife, however, this was not the case, and she was vulnerable to accusations of adultery both by her husband and by a third

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objection that if the courts could not treat adultery as a capital offence, then why could the husband summarily execute the adulterous couple? Especially as even when a guilty verdict is given by a court, the husband would likely be the one who decided the level of punishment. This is something Lorton tacitly acknowledges when he suggests the adulterer of P. DeM 27 was not punished by the courts because the husband chose not to punish the wife. If the punishment lay only in the hands of the court, then once they handed down a guilty verdict it would not matter what the husband did. See Lorton (1977), 15, 38-39.

<sup>441</sup> Or possibly in circumstances sufficiently compromising as to be effectively adultery.

<sup>442</sup> Frymer-Kensky offers two readings of LU 14, which deals with a river ordeal being undertaken following an accusation of adultery. In one of which it is a man who is accused of adultery and undergoes the ordeal, rather than the wife; Frymer-Kensky (1977), 145-148. By her admission, this would be contrary to other Mesopotamian legislation wherein it is the wife who takes the ordeal following an accusation by a third party, and whilst it cannot be ruled out, the other reading of the wife, which is also favoured by Finkelstein (given as LU 11) and Roth, is to be preferred; Finkelstein (1968/1969), 68; Roth (1995), 18. An instance in which a man could be required to undertake a river ordeal for adultery is found in MAL A 22. In this, a man is caught travelling with the wife of another man. If he did not know she was married he can swear to this and pay damages to the husband. If he did know she was married he can swear that he did not have intercourse with her and pay damages to the husband. If the wife then says they did have intercourse, then as he has already sworn and paid damages, the remaining recourse to prove it did not occur is to submit to a river ordeal. He is not required to, though, and if he refuses then he is punished as the husband chooses to punish his wife. This differs from other Mesopotamian adultery legislation on river ordeals, as it is not the result of an accusation by a third party, but by one of the involved parties. This legislation is also in line with MAL A 14, in that the man's liability as an adulterer is only if he admits to knowing she was married. If he swears he did not, then nothing is mentioned with regards to his liability if intercourse had taken place. However, it is a rare example of the adulterer's possible liability when he is not caught in the act.

party, even when she had not been caught in the act. For example, in LH 143, she could be considered tacitly guilty of adultery if she was wayward, squandered her possessions, and refused to have intercourse with her husband. The punishment here is exactly as it would be had she been caught in the act.<sup>443</sup>

Where there was no evidence at all in a Near Eastern legal dispute, one recourse to resolving the case was to refer the matter to the gods in the form of supra-rational procedures such as swearing an oath or undertaking an ordeal.<sup>444</sup> The Law Code of Hammurabi provides several pieces of legislation for dealing with a wife who is accused of adultery, but for which there is no evidence. Two of them relate to circumstances in which the wife is accused by a man other than her husband:

#### **Law Code of Hammurabi 127, 132**

If man causes a finger to be pointed in accusation against an *ugbaltu* or against a man's wife but cannot bring proof, they shall flog that man before the judges and they shall shave off half of his hair.

If a man's wife should have a finger pointed against her in accusation involving another male, although she has not been seized lying with

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<sup>443</sup> Finkelstein (1966), 363. Withholding intercourse on its own is not sufficient proof that she is an adulteress. Her otherwise bad behaviour is required to give the context.

<sup>444</sup> Jas (1996), 73-75; Lion (2000), 151-153.

another male, she shall submit to the divine River Ordeal for her husband.

A river ordeal involved the accused party entering waters associated with a river god.<sup>445</sup> If the person survived the ordeal they were considered innocent, but if they died or refused to undertake the ordeal then they were considered to be guilty.<sup>446</sup> The river ordeal for an accused adulteress of LH 132 varied from the one undertaken by an adulteress caught in the act in LH 129 as the wife here is not bound when she enters the water. Presumably being bound would result in certain death and as such was suitable for a proven adulteress, but

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<sup>445</sup> The exact nature of the river ordeal procedure is unclear. The best evidence for it is found in the Mari Letters, though there is disagreement as to exactly what it involved. Bottéro interprets ARM 26.1 249 as requiring the person undergoing the ordeal to remain afloat for a certain distance; Bottéro (1981), 1005-1067. Durand interprets the same text as requiring the person to remain underwater for a distance of forty metres: Durand (1988), 519-520 n. 62. Heimpel objects to the former on the grounds that anyone who could swim would survive the ordeal, rendering it pointless, and to the latter on the grounds that the swimmer would come up for air rather than drown if they could not complete the distance; Heimpel (1996), 7-8. Heimpel proposes that the ordeal took place in a bitumen spring, which would have subjected the person to uncomfortable temperatures and to noxious fumes which could render them unconscious and cause them to drown; Heimpel (1996), 6-10. Cardascia also rejected Durand's argument on the grounds that it would have been too difficult to achieve. Instead, Cardascia argues that the person did not swim at all, but waded out to a pre-defined distance, and that the judge responsible for imposing the ordeal could manipulate the difficulty of the ordeal based on whether he thought the person undertaking it was guilty or innocent; Cardascia (1993), 169-184. See also Westbrook (2003b), 375. It may have been the case that the requirements were specific to each ordeal undertaken, rather than a set standard for all ordeals; Lafont, B. (2001), 205-206. It is also not clear whether the guilty party was expected to die in the river. The evidence varies depending on the location, but it appears that at least in some places, the outcome of the river ordeal would deliver the guilty verdict, but the person would be pulled from the river and executed rather than dying in the river; Frymer-Kensky (1977); 530-534.

<sup>446</sup> Kataja (1987), 66.

simply being accused required a genuine trial by water which the wife could conceivably survive. Evidence that the river ordeal was a genuine feature of Babylonian adultery legislation is found in the Mari Letters, a city located on the Syrian side of the Euphrates that was invaded and conquered by Hammurabi, and which are roughly contemporary with LH.<sup>447</sup> Among the letters are passages which discuss river ordeals undertaken by wives who have been accused of adultery.<sup>448</sup> In one, a woman accused of both sorcery and adultery is described as having been spat out by the river, which suggests that it was certainly possible to survive the ordeal.<sup>449</sup> In another, it seems that one woman who had been accused and was liable to the ordeal was even able to request another woman do the trial for her.<sup>450</sup>

As the wife who survived the river ordeal was considered to be innocent, then there may well have been consequences for the accuser if this proved to be the case. LH 127 specifies a punishment of flogging and shaving off half of the hair of anyone who brings an accusation against a woman and cannot prove it.<sup>451</sup> The earlier Law Code of Ur-Nammu prescribes a fine of twenty shekels of silver to anyone who brings an accusation of adultery against a wife who in turn is cleared

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<sup>447</sup> Sasson (2015), 1-3.

<sup>448</sup> See Durand (1988), 512-514; Heimpel (2003), 272-273.

<sup>449</sup> ARM 26.1 249.

<sup>450</sup> ARM 26.1 252. That a person could nominate someone else to undertake the ordeal for them is found several times in the Mari Letters; ARM 26.1 253-254.

<sup>451</sup> Shaving off hair is likely intended to humiliate; Richardson (2000), 81, n.62. A similar punishment is found for a person bringing a trial without good grounds in a Babylonian text, where the accuser in this instance also has half of his head shaved, but instead of being flogged is led around the city by his nose; CT 45 18:14-16; see Driver and Miles (1952), 278-279; Westbrook (2003b), 423. This punishment also recalls that of the adulterous Sumerian woman who was led around the city by her nose; Greengus (1969-1970), 33-44.

by the river ordeal.<sup>452</sup> This further suggests that an equivalent piece of legislation to LH 132 must either have existed in the complete LU or be assumed by it.

It is also possible that if there was a punishment should the wife survive the river ordeal, then it would be talionic and the accuser would be put to death. The Mari Letters mention a person who is to suffer death by burning if the people they have accused of treason survive the river ordeal.<sup>453</sup> Similarly, LH 2 deals with a situation in which a man accused of sorcery survives the river ordeal, leading to the execution of the accuser. However, as there is no punishment of any kind mentioned by LH 132, in contrast to LH 2, it is difficult to know if a talionic punishment was intended to be imposed in cases of adultery and is just assumed by the legislation rather than stated. If there is not, then whilst there are talionic punishments attested if a person accused of treason or sorcery survived the ordeal, there may have been no punishment at all for adultery.

LH 127 demonstrates that the law code clearly saw a need for punishing false accusations of adultery, and it could be the case that the same punishment specified there was also applied in LH 132. However, a comparison with the Middle Assyrian Laws is instructive in suggesting

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<sup>452</sup> LU 14. A similar law is found in the Law Code of Lipit-Ishtar, in which a fine of ten shekels is imposed if a virgin daughter is falsely accused of having had sexual intercourse; LL33.

<sup>453</sup> ARM 28 20. This text also demonstrates that there must have been very specific sites in which a river ordeal could take place, as the accused men are sent by the king of Carchemish to Mari so that they can undergo the ordeal there. See Lafont, B. (2001), 204-205.



that these were two different sets of legislation envisaging two different and divergent scenarios. In MAL A 17, if a man brings an accusation of adultery against another man's wife, but he can provide no proof for this, then just as in LH 132 the river ordeal is to be undertaken to determine her guilt or innocence.<sup>454</sup> In MAL A 18, the same accusation is made, but the man here claims that he can prove the charge and then he fails to do so. His punishment is similar to that of LH 127, and he is to be struck forty times, to have his hair shaved, to undergo one month of forced labour, and he must pay a fine.

MAL A 17 and 18 provide a clear comparison with LH 132 and 127 respectively, as each is dealing with the same situations, and dealing with them in the same way. The Middle Assyrian Laws also provide

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<sup>454</sup> MAL A 17 does not explicitly state which party is to undertake the ordeal, meaning it could be either the accuser, the husband, or the wife. Driver and Miles argue for the wife, both on comparison with other Near Eastern legislation and that it is unlikely that the accuser would risk an ordeal, or that a husband would undertake one to clear his wife's name; Driver and Miles (1935), 68, 103. Westbrook argues instead that the ordeal would have been undertaken by the accuser; Westbrook (2003a), 93. The weakness identified by Westbrook in Driver and Miles' argument is that there is no punishment specified for the accuser if the wife is proven innocent by the ordeal. They account for this by suggesting that rather than a slanderous accusation, the husband has heard unprovable gossip and it is he who wishes to test its veracity; Driver and Miles (1935), 68-69. Westbrook argues that MAL A 18 demonstrates that these laws are for public accusations of adultery, therefore the absence of a punishment must mean it is the accuser who is taking the ordeal, with his likely death if he fails the ordeal being the punishment if the wife is proven innocent, Westbrook (2003a), 93, n.31. Whilst Westbrook is almost certainly correct in stating that MAL A 17 does envisage a slanderous accusation, this does not mean that the lack of any mentioned punishment for the accuser means the wife did not undertake it. As is discussed here, it may actually have been the case that adultery was an exception that carried no risk of punishment for the accuser, but even if not, LH 132 is clear that it is the wife who undertakes the ordeal, and there is no punishment for the accuser mentioned here either. As the comparative evidence strongly suggests that it is the wife who undertakes the ordeal when an accusation is made, there is no difficulty in assuming that the wife is also intended in MAL A 17 also; see LU 14; LH 131, 132; ARM 26.1 249; Num. 5.12-31.

some additional detail which makes it clearer where the demarcation point between the two situations is. The accuser of MAL A 17 cannot bring proof specifically because he cannot produce witnesses. As discussed in the section on punishment, witnesses were likely key to proving a charge of adultery in a trial situation. As the accuser of MAL A 18 says he can prove the charges, then this must mean he can bring witnesses, and therefore to reach the point where he does not prove the charges must further mean the case has gone to trial, where he then fails to produce the promised witnesses and is punished as a result.<sup>455</sup> Conversely, as the accuser of MAL A 17 could not bring witnesses then the case would never have gone to trial. Instead, the accuser and the husband draw up the agreement for the river ordeal between them. As he never claimed to be able to bring witnesses nor brought the case to trial, he is not subject to the punishment for failing to produce the witnesses.<sup>456</sup>

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<sup>455</sup> Driver and Miles see LH 127 as envisaging a trial scenario also; Driver and Miles (1952), 276, 278

<sup>456</sup> Frymer-Kensky argues that as the accusation had still been made, then the wife would still have to undergo the river ordeal even as her accuser was punished for failing to bring any proof; Frymer-Kensky (1977), 150-151. It is not out of the question that this could have been the case. LH 132 only makes mention of the wife having been accused without having been caught in the act, so if the accuser of LH 127 cannot bring proof, it will leave the wife with an unsubstantiated accusation adultery made against her. Consequently, it may well be that LH would now regard her as a wife who has been accused without proof, and thus subject to LH 132. By extension the same would presumably apply with regards to MAL A 17 and 18. However, the Middle Assyrian Laws seem a little clearer that this would not be the case as they are presented as alternative situations, rather than complementary ones. Both begin with the accuser approaching the husband with the allegation, but then divert based on whether the accuser says he has proof or not. If the Assyrian wife would remain liable to MAL A 18 even after her accuser was punished as per MAL A 17, it would require the accuser approaching the husband again after the trial, making the allegation again though this time making it clear he had no proof, and then drawing up a contract for the river ordeal. It should be noted that Assyrian

As it is unlikely to be the case that the punishments of LH 127 and MAL A 18 would apply in cases where the wife cleared her name via a river ordeal, and no punishments are mentioned in LH 132 or MAL A 17, the former especially noteworthy as LH 2 is clear that a river ordeal carries a talionic punishment for accusations of sorcery, then it leaves the very real possibility that someone could freely make an unfounded accusation of adultery without risking any consequences.<sup>457</sup> However, LU 127 does specify a punishment, even if it was not talionic, and LH 127 and MAL A 18 do demonstrate that the Babylonian and Assyrian laws did see a need to punish false accusations of adultery, so it would be unusual if this only applied in certain circumstances.<sup>458</sup> The talionic punishment for an accusation of treason is found in a letter by a king rather than in a law code, so the absence of any mention of a punishment in these law codes may not

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legislation from several centuries later is not conclusive proof as to how LH 127 and 132 should be read in relationship to each other, but given their close similarities coupled with the absence of anything in the Babylonian sources to suggest the wife in LH 127 would be liable to the river ordeal, they do provide some useful context.

<sup>457</sup> From his survey of talionic punishments attested for false accusations, Locher does conclude that the law favoured the accusing man over the accused wife. See Locher (1986), 315-80, for the survey, and 376-380, for adultery accusations.

<sup>458</sup> As penalties for false accusations in LH 127, MAL A 18, and LU 14 fall short of execution, Finkelstein concludes that whilst adultery was in theory a capital offence, as it was left to the husband's discretion it must very rarely have been so in practice, and thus the punishment for a false accuser could not be a capital one either, as this would exceed the principle of talion. This contrasts with sorcery and treason, which were prosecuted by the state with set capital offences, and so for the punishment to be talionic if a false accusation was made then it must be death; Finkelstein (1966), 372. This is a convincing argument if only LH 127 and MAL A 18 are considered, which can only guess at the punishment the husband would have chosen had the charge been proven, but for LU 14 the wife has actually undertaken the river ordeal, which presumably did place her life at risk, and so the punishment here would seem to fall some way short of being talionic.

mean the principle of punishing false accusations would be abandoned in this instance, even if it is not explicitly stated.

If a husband wished to bring a formal accusation of adultery against his wife, but had not caught her in the act, then this did not require a river ordeal, and was dealt with under a different law in LH:

### **Law Code of Hammurabi 131**

If the husband accuses his own wife (of adultery), although she has not been seized lying with another male, she shall swear (to her innocence) by an oath by the god, and return to her house.<sup>459</sup>

Oaths were a common resort in the Near East where there was a dispute between two parties and in which there were no evidence nor witnesses

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<sup>459</sup> Driver and Miles read 'return to her house' as the oath has been taken in a court and she then returns home, whereas Stol reads it as meaning her father's house, and that the wife goes back to her family, presumably meaning an end to the marriage; Driver and Miles (1952), 276; Stol (2016), 247. If Stol's reading is correct it would mean the wife is divorced regardless of whether she affirms her innocence with the oath, rendering the oath somewhat pointless, albeit it would prevent her from potentially receiving a more severe punishment, and presumably would allow her to keep her dowry. Divorce is the punishment for the Sumerian woman who admitted adultery rather than take an oath denying it, there is no sense that the Israelite wife who swears an oath is divorced, nor the woman who survives the ordeal of LH 132, and in MAL A 13, the wife is described as going from her house, which cannot be her father's house; NG 205:18-26; Num. 5.12-31. This does leave the question as to what is meant by 'her house' as it cannot normally be the marital home. For MAL A 13, Driver and Miles read it as the husband is absent, but here they read it as the wife's quarters within the marital home, albeit this is read with LH 148 which refers to quarters built in specific circumstances; Driver and Miles (1935), 42; (1952), 284. As there is no evidence from the Near East which would provide context for anything other than the innocence of the wife being proven by taking the oath, then whatever is meant by 'her house', it is unlikely to mean she must return to her father's home.

to settle the outcome.<sup>460</sup> For example, in the Middle Assyrian Laws, a man who has intercourse with an unmarried virgin can avoid part of the penalty by swearing an oath stating that the act was consensual and that he did not force himself on her.<sup>461</sup> Swearing an oath was considered to be an ordeal just like entering the water, and if a guilty person feared the consequences of falsely swearing an oath and refused to take it, then as with refusing a river ordeal, this was also effectively an admission of guilt.<sup>462</sup> In the case of the Sumerian wife divorced for committing adultery, she chose to confess to the crime rather than falsely swear an oath that she had not.<sup>463</sup> The procedure required the oath-taker to swear the oath in or at the door of a temple, in a shrine, or before an emblem of a god, and given the seriousness with which it was regarded, swearing it was considered proof that the oath-taker was telling the truth.<sup>464</sup> It is not clear why it is that the procedure varied depending on whether the husband or a third party has made the accusation. It may be that in the case of an accusation by a third party, then a river ordeal provided a necessarily immediate resolution to the

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<sup>460</sup> Lafont S. (2003), 528; Postgate (1992), 280. Oaths were themselves a form of ordeal and are one of the features which makes it possible to speak of a common Near Eastern judicial system, as they occur in so many Near Eastern societies, across all periods; Driver and Miles (1940), 132; Westbrook (2003b), 24.

<sup>461</sup> MAL A 55-56; see also Driver and Miles (1935), 57-60. Similarly, a man who travels with another man's wife can offset some of the penalty by swearing an oath that he did not know she was married; MAL A 22.

<sup>462</sup> Driver and Miles (1935), 90-92, and (1952), 466-468; Westbrook (2003b), 376. Refusing to swear an oath was even expressed as fearing the oath in Babylonian and Hebrew sources; Landsberger (1937), 77.45-78.50; Eccl. 9.2.

<sup>463</sup> NG 205:18-26.

<sup>464</sup> Driver and Miles (1952), 467; Lafont, S. (2011), 350-351; Westbrook (2003b), 34, 374. A proverb cited in a Neo-Assyrian letter even goes as far as to state that a sinful wife's word is taken over her husband's when in court; ABL 403.13-15; Lambert (1960), 281; Steele (2007), 302.

charge, as any divine judgement would be immediately rendered, whereas divine judgement was not necessarily immediate to a person who falsely swore an oath.<sup>465</sup> It also protected the wife from a husband who wished to be rid of her and for which the river ordeal could provide a convenient way of doing so. Whilst at the same time if a husband was genuinely suspicious, and there was a punishment for the accuser if the wife survived a river ordeal, then it would not place the couple in a situation in which either the wife died or the husband risked a punishment that could possibly be his own death if there were talionic punishments for adultery accusations. Both spouses would leave an oath ordeal physically and financially intact if the wife was prepared to undergo it.

The swearing of an oath by an accused wife is also found outside of Mesopotamia in both Egypt and Israel.<sup>466</sup> From the New Kingdom period in Egypt, an ostrakon fragment records part of the text of a judicial oath spoken by a wife accused of adultery.<sup>467</sup> As only part of it

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<sup>465</sup> Fishbane argues from the reference to the wife entering the water for her husband, that an accusation from a third party impacts the husband's reputation and requires an immediate and public resolution, whereas the husband's suspicions are private, and the oath procedure allows them to remain that way; Fishbane (1974), 37-38. See also Wells (2005), 53; Westbrook (2003b), 376; Willis (2001), 197.

<sup>466</sup> Whilst the river ordeal is not attested in either society, the Hebrew Bible does suggest a knowledge of the river ordeal in a number of passages which speak metaphorically in terms of the speaker being rescued from the waters by God. Kyle McCarter argues that the term *'ed* in the Hebrew Bible can specifically refer to a river ordeal, though allows for them to be part of a shared conceptual space with Mesopotamia rather than a feature of Hebrew legislation; Kyle McCarter (1973), 403-412.

<sup>467</sup> "The wife was like a (good) wife; she did not commit love, she had no extramarital intercourse with..." (trans. Pestman); *O. Cairo* 25227. A similar oath survives from either the Ptolemaic or Roman period of Egypt; *O. Louvre* 8112 II.4-6.

survives it lacks any context with regards to the circumstances which brought about the oath, nor does it mention any possible punishments, but as what does survive is the wife affirming she has not been unfaithful, then it would at the least seem a very similar procedure to that found in LH 131.

The other account of an oath sworn by an accused wife is found in the Hebrew Bible at Num. 5.12-28, and this is also by far the fullest.<sup>468</sup> The circumstances here are the same as in LH 131, in that a husband who suspects his wife of adultery but who has no witnesses to prove it, can bring his wife to a priest to have her swear an oath as to her innocence. This passage gives a detailed account of the procedure the wife must follow to swear the oath. The husband first brings his wife along with a grain offering to the priest, who places the offering into the wife's hand, and recites a curse whilst holding bitter water.<sup>469</sup> These curses

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<sup>468</sup> There are a number of repetitions within this passage, which has led several scholars to use source criticism to argue that it is a combination of two different procedures; see Budd (1984), 62-63 for a review of scholarship. Among them is de Vaulx, who has argued that the two procedures are a direct parallel to LH 131 and 132, though to do this he makes the demarcation point between the two passages the level of certainty over the wife's guilt, rather than the source of the accusation being either the husband or someone else. As it is the latter which separates LH 131 and 132 then the comparison is unconvincing; de Vaulx (1972), 93. Whilst it may or not be the case that two procedures have been combined, if they have then both are intended to be used by a jealous husband against a wife suspected of adultery, but against whom there is no evidence. There is no mention in Num. 5.11-15 of anyone other than the husband bringing an accusation. Bewer argues, also based on LH 131 and 132, that the two procedures were originally separate, one consisting of an oath and a meal offering, and the other consisting of an ordeal involving drinking cursed water, and that they have been later combined by Hebrew law; Bewer (1913), 36-47. However, these two elements are found combined in a single procedure partially preserved on a Middle Assyrian tablet. Here, the two litigants drink the water and swear the oath, and they are regarded as innocent if they do so; VAT 9962.

<sup>469</sup> Num. 5.15-22. Water drinking as part of an oath ceremony has already been mentioned with regards to the Middle Assyrian text VAT 9962. There may also be another water drinking ordeal in the Hebrew Bible which takes place at Exod.

are washed into the water, and the wife must drink it, with the punishment for falsely swearing the oath being that the water will “enter your bowels and make your womb discharge, your uterus drop”.<sup>470</sup>

It is worth noting that the punishment for the wife who commits adultery and falsely swears an oath is not death, which is the mandated punishment in all the adultery legislation in the Hebrew Bible. Milgrom

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32.32. After Moses discovered the Israelites worshipping a golden calf, he ground the calf into a powder, mixed it with water, and made the Israelites drink it, which may have been an ordeal to determine which of the Israelites was guilty of idolatry; Milgrom (1989), 348.

<sup>470</sup> Num. 5.22-24. The exact meaning of this punishment is a little unclear. What the NRSV translates as ‘uterus’ is *yarēch* which actually means ‘thigh’, although it is used in Gen. 46.26 to describe Jacob’s descendants ‘coming forth from his thigh’, so can be used euphemistically to refer to offspring. *Beten* means ‘belly’ but is used in Judg. 16.17 by Samson to refer to himself being born from his mother’s belly. This gives the two most likely explanations for the effect of the curse on an adulterous wife to be either causing sterility, causing a miscarriage, or perhaps either depending on whether the wife was pregnant or not. Brichto sees the fallen thigh as sterility, but argues that the use of verb *šbh*, which only appears in the Hebrew Bible in this passage, but is used in post-Biblical Hebrew to mean ‘to swell’, must refer to a swollen belly, but sees the bitter water as causing a false pregnancy and sterility in the wife, rather than the wife being pregnant already; Brichto (1975), 66. Similarly, Driver suggests that if the water causes the belly to swell then it could not already be swollen, and so cannot mean the wife is pregnant, though argues that the verb refers to becoming dry, which means sterile, but that the fallen thigh means to miscarry, and both punishments are intended; Driver (1956), 74-75. Milgrom favours sterility as the only punishment, dismissing Driver’s interpretation of the falling thigh and citing passages elsewhere in the Hebrew Bible in which sterility is a punishment for sexual offences; Milgrom (1989), 303 n.64. If it is an either/or punishment based on whether the wife was pregnant, as Driver argues, then this raises the odd circumstance in which the adulterous wife who is pregnant by her lover loses the baby but can continue to conceive, but the adulterous wife who did not fall pregnant cannot have any more children. If it is both punishments which are intended then it would only make sense if the oath was sworn by a pregnant wife only, as one who is not could not miscarry. As the passage makes no mention of the wife’s pregnancy as being the cause of the husband’s suspicion, nor does the parallel passage in LH 131, then it seems most likely that sterility is the intended punishment for an adulterous wife who undergoes the oath. See also Frymer-Kensky who suggests the result is a prolapsed uterus, and Levine who notes the contrast with the innocent wife retaining her seed, though is non-committal on whether this should be read literally to mean a child or to mean the ability to procreate; Frymer-Kensky (1984), 20-21; Levine (1993), 201-202.



explains this away by arguing that as the adulteress has not been apprehended in the act, she is protected from secular punishment, especially as the system could be abused by a husband who wished to no longer be married to his wife.<sup>471</sup> Whilst the sterility inflicted on the wife is clearly envisioned as a divine punishment rather than a secular, befitting its status as an ordeal, it begs the question that if this was available as a divine punishment, then why was not death an option, especially given the vehement mandate elsewhere in Leviticus and Deuteronomy that the adulteress must be put to death else she defile the land and risk the relationship of the Israelites to God? As has been seen, death is certainly a possible outcome for an ordeal elsewhere in the Near East, and death by ordeal is seen to be a divine judgement. It is further argued by Milgrom that sterility is a measure-for-measure retribution by God, though the comparative examples he cites of Jacob's deception of Isaac, and the penalty of forty years wandering in the wilderness, are not crimes with mandated punishments in the manner of adultery, and nor is God elsewhere unwilling to kill those whose behaviour affects the Israelites' relationship with God.<sup>472</sup>

It seems most likely that the procedure for a wife accused of adultery by a jealous husband who had no evidence for it was ultimately intended to allow the wife to be considered innocent simply by swearing the oath. As Brichto points out, it is unlikely that an ancient Israelite would expect that any physical swelling of the belly or falling

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<sup>471</sup> Milgrom (1989), 348-350.

<sup>472</sup> Milgrom (1989), 350. See Gen. 38.7, Lev. 10.1-3, and Num. 16.27-32, 25.9 for examples of divine killings in the Pentateuch.

of the thigh would actually occur when the wife drank the bitter water.<sup>473</sup> An ordeal in which death was a genuinely possible outcome would require the wife to be placed in physical danger, such as in the river ordeal, and Milgrom is correct in pointing out this would be open to abuse by a husband who wished to be rid of his wife, albeit not because the wife in this situation is protected from secular punishment, as divine punishment could certainly be death also, such as the river ordeal was. This would bring Num. 5.12-28 into line with LH 131, and they each serve the same function. The wife undergoes a similar procedure in each having been accused of adultery without any proof by her husband, it is one which does not place her in any actual physical danger, and although Numbers allows for a theoretical and immediately obvious physical punishment, in reality the expectation would be that this would not occur. Instead, the seriousness with which oath-taking was regarded would mean any wife who underwent this ordeal would be considered innocent, with the possibility of a divine punishment in the form of sterility if she was lying, which was a punishment that did not require any immediately visible effects.

As this survey of ordeals and oaths suggests, their usage across in the Near East was not entirely uniform, as whilst oaths are attested across the region, the river ordeal seems to have been a Mesopotamian procedure. However, whilst the method may not always be consistent, the intent to have the divine adjudicate a case in which evidence is

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<sup>473</sup> Brichto (1975), 66.

absent remains consistent. More importantly for this case study, is the diminishing use of supra-rational procedures from the second quarter of the first millennium onwards. In Mesopotamia, the river ordeal all but disappears from the record, whilst swearing the judicial oath no longer means a decisive victory, with physical evidence becoming favoured ahead of it.<sup>474</sup> In the Hebrew Bible, a reform of the Judaeen judicial system is at least envisioned, if not necessarily enacted, in Deuteronomy.<sup>475</sup>

As this is contemporary with the period of Greek history with which this case study compares, then if the situation in the Near East had moved away from supra-rational procedures, then it could be misleading to include them in comparison. Whilst this should be borne in mind, two points speak strongly in favour of their inclusion. The first is that Mesopotamian legislation on adultery always favoured physical evidence, and supra-rational procedures were resorted to in their absence, and even then, only with regards to the wife.<sup>476</sup> Both LH 127 and MAL A 18 are testament to the value placed on physical evidence

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<sup>474</sup> For the absence of ordeals in the Neo-Babylonian period see Joannès (1997), 163-174. There are examples in the preceding Neo-Assyrian period; Kataja (1987), 66. For the reduction in force of the judicial oath in this period see Magdalene (2004), 304-309. Otto and Ries see these trends as the result of a secularising tendency in Mesopotamian courts from the Neo-Babylonian period onwards, whereas Wells considers the Mesopotamian evidence alongside Biblical evidence to argue that it stemmed from an attempt by officials to acquire stricter control over economic, political, and religious issues; Otto (1998), 263-283; Ries (1999), 457-468; Wells (2008), 205-232.

<sup>475</sup> Centralising of the cult, secularisation, and rationalisation are all identified as possible reasons for the changes envisaged by the Deuteronomist; See Fishbane, (1985), 91-230; Levinson (1997), 118; Otto (1996), 112-122; Patrick (1985), 125; Weinfeld (1972), 233-236.

<sup>476</sup> Barring MAL A 22, which was for a very specific set of circumstances, and for which the agreement to undertake the ordeal was not binding.

in adultery cases, with LH 132 and MAL A 17 specifically for when there is no evidence, and legislation which allows for a capital punishment requires the couple to have been caught in the act. The second is the detailed oath procedure of Num. 5.12-28. This is commonly attributed to the Priestly source, which is post-exilic, and indicates that supra-rational procedures for adultery cases lacking evidence remained in the Hebrew imagination even after Deuteronomy, and well into the period of Greek history under comparison.

#### Equal Punishment

One final element common to Near Eastern adultery legislation is found in the requirement that whatever punishment the husband chose to impose upon the adulterous lover, must also be imposed in equal measure by the husband upon his wife. As has already been seen in LH 129, the husband could choose to spare his wife from being bound and thrown into the water, but if he does, the king will also spare her lover from the same fate. In MAL A 15, the husband is required to impose equal levels of punishment on the adulterous couple. This does not necessarily mean the same punishment, as cutting off his wife's nose is equated with turning the lover into a eunuch, but this law is clear in stating that if the husband wishes to release his wife, he must also release her lover. In HL 197-198, the husband may kill the couple if he

catches them in the act or bring them to the palace gate and state that he will not kill his wife, but if he does must also spare her lover.<sup>477</sup>

The existence of the same rule in Egypt is heavily implied by P DeM 27. In this, a man on two separate occasions took an oath not to commit adultery, each time with the same woman.<sup>478</sup> Aside from demonstrating that not everyone in the Near East took oath-taking seriously, it is obviously the case that after the first occasion, neither member of the adulterous couple was killed, nor was the wife divorced. The first oath sworn stated that if the man even spoke to the woman again, he would have his nose and ears mutilated and be banished to Nubia. Whilst it is possible that the mutilation could have occurred, the man clearly could not have been banished to Nubia when he was caught a second time, as the second oath would send him to hard labour at Elephantine if he broke it. Given the insistence elsewhere of equal punishment, then the likely reason that the adulterous lover twice escaped from being caught with nothing more severe than promising not to do it again, is that the husband did not wish to punish the wife, and therefore could not enforce the punishment on her lover.<sup>479</sup>

It is difficult to know whether this rule existed in Israel and Judah, given that the legal material in the Hebrew Bible mandates the death penalty for both members of the adulterous couple without discretion

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<sup>477</sup> If the husband does set them free he must also 'clothe his (the lover's) head'. Exactly what this means is not clear; Roth (1995), 240, n.65.

<sup>478</sup> See Allam (1973a), 301-302, and (1973b), 98-99.

<sup>479</sup> Lorton has suggested that the husband's decision not to punish his wife removed any obligation on the court to punish the adulterer, and so the oaths were not enforced by them; Lorton (1977), 38-39.

given to the husband.<sup>480</sup> If Prov. 6.32-35 is a window into actual practice, it is insufficient to demonstrate whether the enraged husband was required to punish his wife with something comparable to the beating he deals out to her lover. However, clear evidence for equal punishment in Mesopotamia, Egypt, and the Hittite kingdom, suggests that if Proverbs 6.32-35 shows Israelite practice was in line with the rest of the Near East with regards to the husband's discretion in imposing punishment, then it may also be in line with regards to requiring that whatever punishment he chose should be imposed equally.

Exactly why this requirement of equal punishment is found in a number of Near Eastern adultery laws is not clear, as no source discusses it. Driver and Miles suggest it was partly due to fairness, and partly because there could have been no offence against the husband if he did not punish his wife, so consequently there was nothing to punish the adulterer for.<sup>481</sup> This latter element is identified as further having the advantage of preventing the husband from blackmailing the adulterer, as without a punishment inflicted on the wife there would be nothing

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<sup>480</sup> Although it is noteworthy that both of the couple are to suffer the punishment, so whilst it may not be the case that these two laws envisage the husband as having discretion over the level of punishment, the punishment remains equal. McKeating suggests that it may be the implicit intention of these laws that the death penalty can only be exacted if both parties suffer it; McKeating (1979), 58-59, followed by Westbrook (1990), 551. However, given the context of these passages in the broader legislation of Leviticus and Deuteronomy, it is difficult to envisage the intention of these laws to be that the wife must die if the husband is to kill her lover. Adultery is one of the several crimes which must be punished to maintain the relationship between the Israelites and God, and so as both parties have committed adultery, then both must be punished. Leaving the wife alive would mean an adulteress remains in the land and amongst the people.

<sup>481</sup> Driver and Miles (1935), 24. See also Cardascia (1969), 119.

to blackmail the adulterer for.<sup>482</sup> Westbrook allows for fairness to be a consideration, but primarily sees the requirement as designed to prevent collusion and entrapment.<sup>483</sup> If the husband could freely choose separate punishments for each party, then he could collude with his wife to seduce another man, possibly for financial gain or to remove a rival. Stol disagrees that the requirement had anything to do with collusion, pointing out there is no proof for it, and instead argues it is nothing more than fairness.<sup>484</sup>

The Middle Assyrian Laws contain another example of equal punishment for adultery in addition to that of MAL A 15. In MAL A 23, a woman who takes another man's wife into her home and gives her to another man for the purpose of sexual intercourse, is liable to the same punishment as the husband inflicts on his wife. If the wife is not punished, then she is not to be punished either. If collusion is the concern then this would seem an elaborate way to go about doing it, as the husband and wife could collude together without the help of a third party, plus the wife is punished regardless in this scenario. It seems much more likely that if the husband does not punish his wife, then the procuress is considered not to have committed an offence against him.<sup>485</sup> By extension, this would suggest that the requirement of equal punishment for cases for adultery was at least partly rooted in the act

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<sup>482</sup> Driver and Miles (1935), 24.

<sup>483</sup> Westbrook (1990), 554.

<sup>484</sup> Stol (2016), 240.

<sup>485</sup> Similarly, in MAL A 24, if a man's wife should withdraw from his house and reside in the house of another married couple, he may punish the couple, but only if he mutilates his wife and divorces her. If he does not mutilate her, he must take her back and can impose no punishment on the married couple.

being an offence to the husband. If he did not punish his wife then he could not consider her as having committed an offence, and so no offence had been committed against him by either party.

Support for this reading is suggested elsewhere in the Middle Assyrian Laws. In MAL A 4, slaves who receive property given to them by a wife, which presumably means the property was taken by her from the husband without his permission, are liable to mutilation and the return of the property. The wife is also to be mutilated, but if she is not, then the husband can neither mutilate the slaves nor take the property back. This must be because if the husband does not punish his wife then he cannot consider her actions as a wrong against him, and thus the property cannot have been stolen. Her lack of punishment is proof that he does not consider the slaves to have received stolen goods. It would seem unlikely that this law is concerned with the situation in which a husband and wife collude just to mutilate slaves. Nor does fairness alone seem an adequate explanation, as that would mean the law does consider that a crime has been committed by the wife but is concerned with fairness with regards to the slaves.

It could be argued that the underlying principle behind these laws is still that of collusion, as by allowing the husband to set the level of the offence it prevents collusion from occurring. However, in the absence of any evidence in support of this, collusion and entrapment must be seen as secondary considerations behind the discretion of the husband to decide whether he wishes to regard his wife as having committed an offence against him, and the extent to which he regards it as an offence



if he does choose to punish. This is not to say that collusion was not a consideration, only that it was not primary. Fairness as the sole consideration is an inadequate explanation. Caution should be taken in extrapolating a general principle for the entire Near East from just the Middle Assyrian Laws, but as they provide some insight into what is a more widely attested Near Eastern practice, then it is reasonable to suppose that they highlight a more general approach to the subject of equal punishment in the Near East.

### *Moicheia* Legislation in Classical Greece

Whereas the Near Eastern evidence allows for a relatively unproblematic reconstruction of both what the offence of adultery was and how it was punished, the situation is much less clear in Greece. As would be expected, much of the surviving evidence for adultery and how it was dealt with in law comes from Classical Athens, but whilst there are narrative accounts, legal speeches, and laws which all touch on the topic, there is dispute over exactly what the offence was and how it was punished. Much of the issue stems from the fact that adultery as a specific offence did not exist in Athens. Whilst the act was recognised and legislated against, it was done so as part of a broader offence known as *moicheia*, and not as the singular offence of adultery. A number of scholars have attempted to both define what *moicheia* was and to identify a single unifying element which tied adultery to the

other sexual offences that were seemingly covered by it, without any consensus emerging, particularly on the latter point.

In addition to the Athenian sources, important evidence for *moicheia* is also provided by Gortyn. This was a *polis* on Crete whose laws provide the best collection of legal material for any Greek *polis* outside of Athens.<sup>486</sup> Amongst the inscribed laws is the Gortyn Law Code, which most likely dates to the second half of the fifth century, which collects together laws enacted from at least the early sixth century onwards, and of which what survives is likely one part of a larger and more complete code.<sup>487</sup> The laws on *moicheia* are contained within a section relating to family law and are part of a larger section on sexual offences, and they appear alongside laws on topics such as divorce, inheritance, property, and children. By having material on *moicheia* law from two different *poleis*, it does make it possible to speak in more general terms of a Greek approach to adultery, rather than a purely Atheno-centric approach, and the evidence from one *polis* helps to shed light on the evidence from the other. As will be seen, whilst they differ on some details, broadly speaking they present very similar approaches to *moicheia*.

This section begins with an attempt to understand what *moicheia* was by reviewing the evidence for it, and then discussing the scholarship which has attempted to interpret it. It is followed by an examination of the legal procedures for prosecuting *moicheia* and the punishments a

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<sup>486</sup> Gagarin and Perlman (2016), 264-265.

<sup>487</sup> Gagarin (1982), 129-146; Gagarin and Perlman (2016), 335.

*moichos* was liable to. Both of these discussions lead into the closing section, which examines how the woman was dealt with in the light of the Near Eastern requirement that the wife be punished to an equal degree as her lover, and what this can tell us about how *moicheia* differed from adultery. A communal concern in Athens over the presence of a *moichos* and his lover is also noted, which differs from the situation in the Near East, and recalls a similar concern over the presence of both an accused and a convicted killer within the *polis*.

#### The Definition of *Moicheia*

In the fourth century Athenian lawcourt speech, *On the Killing of Eratosthenes*, the speaker, Euphiletus, was the defendant in a homicide trial. Euphiletus did not deny that he killed Eratosthenes, but rather he offered as his defence that the killing was lawful, and thus he was not liable to any sanction. The reason that it was a lawful killing was because Euphiletus claimed he caught Eratosthenes in the act of sexual intercourse with Euphiletus' wife, in Euphiletus' house.<sup>488</sup> This is clearly an example of what in Near Eastern law would be adultery. The word used by Euphiletus to describe the act is *moicheia*, and as the perpetrator of *moicheia*, Eratosthenes is a *moichos*.<sup>489</sup> Whilst there are Athenian sources which do discuss *moicheia*, and some which mention or discuss laws on it, unfortunately very little text of any actual

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<sup>488</sup> Lys. 1.24-27.

<sup>489</sup> For example, Lys. 1.31, 1.36. The verb is *moicheuō*; Lys. 1.4.

*moicheia* laws survive. It means that unlike in the Near East, where a number of adultery laws survive from across several civilisations, defining the offence of *moicheia* in Athenian law is comparatively difficult.

In total, there are three Athenian laws which can be positively identified as being laws which mention *moicheia*. In the list of duties undertaken by the *thesmothetai*, the *Constitution of the Athenians* lists several *graphai* which fall under their authority, and among them is a *graphe moicheias*.<sup>490</sup> Unfortunately, the text provides no more information than the name. What is of interest when compared with the Near East, where the offence was cast as one against the husband and one in which he had the right to decide the punishment, is that as a *graphe* this was a public suit, which means it could be brought by any free adult male.<sup>491</sup> This presumably meant that a husband whose wife was caught with a *moichos* may find that he had no say in whether the *moichos* was punished, nor the extent to which he was punished, if a suit was brought by a third party under this law. This is in stark contrast

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<sup>490</sup> *Ath. Pol.* 59.3.

<sup>491</sup> Both Harrison and MacDowell suggest that this procedure may have been for circumstances in which the *moichos* had not been caught in the act. This would itself be unusual in comparison to Near Eastern adultery law wherein there were virtually no circumstances in which the adulterer was liable for punishment if not caught in the act: Harrison (1968), 35; MacDowell (1978a), 125. It also begs the question as to how the case could be proven if there were no witnesses to it, which is precisely why Near Eastern law needed the adulterer to have been caught in the act. There is also no surviving Athenian law which specifically deals with punishing a *moichos* caught in the act. The lawful homicide law discussed below would cover this, but unless it also mandated killing a *moichos* caught in the act then it could not cover all possibilities for this circumstance. It leaves the *graphe moicheias* as the only surviving law under which a prosecution for *moicheia* could be brought, and this almost certainly would have covered situations for which the *moichos* was caught in the act.

to the Near Eastern husband whose interests were paramount in the prosecution of adultery. The offence was to him, as was the decision to prosecute, and the level of punishment.

Two further laws which reference a *moichos* are found in the lawcourt speech, *Against Neaira*. One of these laws has the text of it given in the speech:

**[Dem.] 59.87**

After he has caught the *moichos*, the man who caught him shall not be permitted to continue living with the woman. If he continues living with her in marriage, he is to be disenfranchised. And the woman with whom a *moichos* has been caught shall not be permitted to attend the public cult ceremonies. If she enters, she is to suffer whatever she suffers, except death, with impunity. (trans. Kapparis)<sup>492</sup>

Whilst this law deals directly with *moicheia*, it does not define what the offence of the *moichos* is. Instead, this law is concerned with the obligations placed upon the husband who has caught his wife with a *moichos*, and the sanctions the wife is exposed to for being caught with a *moichos*. This is the only Classical Athenian law on *moicheia* for which any text survives, but, unfortunately, and as will be discussed below, it is almost certainly a forgery which does not accurately reflect the law it attempts to reconstruct. This means that whilst Athenian laws

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<sup>492</sup> I have given '*moichos*' in place of Kapparis' '*seducer*'.

on *moicheia* certainly existed, nothing survives of them, and consequently the offence of *moicheia* must be inferred from discussions of the laws that intersect with *moicheia*, and non-legal sources which discuss it.

The other law on *moicheia* in this speech is not cited in the text, but rather is just discussed by the speaker, Apollodorus. Here, a man named Epaenetus was caught committing *moicheia* against a man named Stephanos. The latter held Epaenetus until he promised to pay a fine of 30 minae. After being released, and instead of paying the fine, Epaenetus went to the *thesmothetae* and indicted Stephanos on a charge of unlawful imprisonment for *moicheia*.<sup>493</sup> As with the previous law, whilst it mentions the *moichos*, it assumes the offence rather than gives any attempt to define it.

Both of these laws are cited in reference to a woman named Phano, of whom Apollodorus is attempting to convince the *dikastai* that she was the daughter of a non-Athenian woman named Neaira and passed off as his own daughter by her lover, Stephanos. Apollodorus claims that Stephanos invited Epaenetus to his house with the intention of extorting money from him through entrapment by catching him in the act with Phano.<sup>494</sup> When Epaenetus brought his counter-charge of unlawful imprisonment, he admitted to having had sexual intercourse with Phano, but denied it was *moicheia* on the grounds that Phano was not

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<sup>493</sup> [Dem.] 59.65-66. As is discussed below, this law is a forgery. See Canevaro (2013), 190-197.

<sup>494</sup> [Dem.] 59.64-65.

Stephanos' daughter, that her mother knew of the affair, and that he lavished large amounts of money on them. Epaenetus claimed that Stephanos and Neaira primarily made their living in this way, and thus Phano was to be regarded as a prostitute.

What is remarkable about this is that nowhere does Epaenetus make his defence on the grounds that Phano was not married. That the woman was a wife was an integral aspect of Near Eastern adultery law, to the extent that laws such as LE 27-28 make the exact marital status of the woman fundamental to whether she was liable to punishment as an adulteress, and MAL A 13-14 make the man's knowledge of her marital status fundamental to whether he was to be punished as an adulterer. The offence here was not against any husband, as Phano was not married when the act took place, but against Stephanos as her father. It is Stephanos who catches them in the act, who holds Epaenetus, and to whom the fine is to be paid. Likewise, it is Stephanos' relationship to Phano that Epaenetus seeks to challenge when making his defence, as if Phano was not his daughter, then he could not have committed *moicheia* against him.

Based on the grounds upon which Epaenetus does make his defence, it can be determined that it was not *moicheia* to have intercourse with a prostitute. Near Eastern legislation does not need to specify this, as adultery must be with a wife, though it can be extrapolated from the punishments in the Hebrew Bible which treat the adulterous wife as if

she were a prostitute.<sup>495</sup> It may also be the case that one of the reasons the adulterer of MAL A 14 would not know the woman he met in an inn or on the street was married was that he could reasonably assume she was a prostitute. With regards to the defence that Phano was not Stephanos' daughter, but Neaira's, it may be the case that intercourse with a non-Athenian citizen could not be *moicheia*, or it more likely is the case that Epäenetus is demonstrating that he could not have committed *moicheia* against Stephanos, to whom he owes the fine. As he claims as part of his defence that Neaira knew of the affair, then it may also be the case either that sexual intercourse could not be *moicheia* if the person the offence would be to both knew and approved of it, or that it was *moicheia*, but the offender could not be legally liable for it.

Subsequent to the affair with Epäenetus, Apollodorus claims that Stephanos then tricked a man named Theogenes into marrying Phano by representing her as his daughter. Theogenes was serving as king archon at the time, and as his wife, Phano was required to make sacrifices. Once her status was discovered, and facing punishment from the Areopagus, Theogenes plead that he had been deceived by Stephanos, and divorced Phano to prove it. It is here that Apollodorus references the law that a woman who has been taken by a *moichos* cannot attend public sacrifices. In neither this marriage, nor her previous marriage to a man named Phrastor, has Phano been presented

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<sup>495</sup> Jer. 12.26-27; Ezek. 16.37-38, 23.10, 29; Hos. 2.5; Nah. 3.5.



by Apollodorus as having committed adultery. Only the incident with Epaenetus is presented as *moicheia*, meaning her liability to this law must come from this incident.<sup>496</sup> It means both instances of *moicheia* law cited by Apollodorus do not refer to adultery at all, but to intercourse between a man and an unmarried daughter, with the offence being committed against the father, to whom also lay the right of redress.

Earlier in the same speech, Apollodorus claims that Stephanos and Neaira conspired to entrap and blackmail rich foreigners in the exact same manner as they later entrapped Epaenetus with Phano, and here too, the offence which is claimed by Stephanos is that the rich foreigner is a *moichos*.<sup>497</sup> In this circumstance, it is as Neaira's husband that the *moichos* commits an offence against Stephanos, and it is as the husband that he is able to extort a payment from the *moichos*. In this lawcourt speech, the offence to Stephanos is identical in each incidence,

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<sup>496</sup> Apollodorus does make insinuations as to Phano's behaviour whilst married to Phrastor, but no incidents of adultery are mentioned and nor is it part of Phrastor's reasons for divorcing her; [Dem.] 59.50-51. This of course contradicts Apollodorus' account of the affair between Epaenetus and Phano. Omitowojou sees no contradiction here, stating that although Epaenetus cannot have committed *moicheia* with Phano, Phano can still be considered to have been taken by a *moichos*. She argues that this is because *moicheia* is a flexible term concerned about the respectability of those involved rather than any marital relationship, and that the effective counter open to Epaenetus is not that she is not married, but that she can never be a respectable citizen-wife; Omitowojou (2002), 78-80. It seems much more likely that Apollodorus is happy to inconsistently characterise Phano in whichever way suits his given argument best, than there existed a Classical Athenian doublethink in which a woman could be taken by a *moichos* who was not in fact a *moichos*, because she was not seen as respectable; see Kapparis (1999), 353. Contrary to what Omitowojou claims, it is, in fact, her lack of respectability which Epaenetus calls upon to demonstrate that sexual intercourse with her could never be *moicheia*. See Harris (1997) 492-496, for a criticism of Omitowojou's views on the status of a woman with regards to *hubris* and *moicheia*.

<sup>497</sup> [Dem.] 59.41.

regardless of whether the *moichos* had sexual intercourse with his wife or his daughter.

Another instance of *moicheia* with an unmarried daughter is found in the comedy, *The Girl from Samos*, by Menander. The plot revolves around a misunderstanding over the paternity of a child, leading a man named Demeas to believe his adopted son, Moschion has had an affair with Demeas' mistress. In fact, Moschion had fathered the child with the daughter of another man, Nikeratos, and confesses this to both men to clear up the misunderstanding. Later in the play, Nikeratos accuses Moschion of being a *moichos*.<sup>498</sup> The play also has reference to *moicheia* in a mythical context, as Demeas recounts the story of the impregnation of Danaë by Zeus and uses the verb *moicheuo* to describe Zeus' actions. As with Nikeratos' daughter, Danaë is not married, and any *moicheia* must have been committed against her father. Aristophanes in *Birds* uses the same verb to describe the seduction of Alkmene, Semele, and Alope by Zeus and Poseidon, respectively.<sup>499</sup> The former was married, whilst the latter two were unmarried daughters.

Returning to Euphiletus and his defence of lawful killing, despite his citation of three laws in support of his case none of them survive in the

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<sup>498</sup> Men. *Samia* 717. Nikeratos accuses Moschion of being a *moichos* who had been caught in the act, despite the fact the affair only came to light much later when circumstances forced Moschion to admit to it; Men. *Samia* 717-718. It does suggest that a confession could be regarded as the same as being caught in the act, although the context within which this is found suggests caution should be exercised in accepting it as legal material. See Sommerstein (2013), 313.

<sup>499</sup> Aristoph. *Birds* 558-559.

text which leaves us with just his discussion of them. Of particular interest, are two laws cited by him which he claims are in direct support of his killing of Eratosthenes.<sup>500</sup> Unfortunately, the discussion of the first of these makes it very difficult to know what it was.<sup>501</sup> It seems as if it was a law that allowed for the killing of a *moichos* caught in the act, as Euphiletus states that Eratosthenes admitted his guilt, and attempted to offer compensation as a penalty, but that Euphiletus killed him in accordance with the law under discussion. Exactly what this law may have been will be discussed further in the section on procedures and punishments, but for now it is sufficient to note that it adds nothing to the understanding of what the crime of *moicheia* was beyond that it at least covered sexual intercourse with another man's wife.

Euphiletus also cites a law of the Areopagus which he claims states that a man is not liable to a homicide conviction if he kills a *moichos* that he catches in the act of sexual intercourse with his wife.<sup>502</sup> Euphiletus states that so seriously did the Areopagus regard the offence, that they extended the same right to kill even if the woman was a *pallake*, a concubine, and not a wife.<sup>503</sup> The text of the law that Euphiletus cites is not preserved in the speech, but it would seem to be the same law as a one mentioned by Demosthenes in *Against Aristocrates*:

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<sup>500</sup> Euphiletus also cites a third law at Lys. 1.31 though it is not a *moicheia* law.

<sup>501</sup> Lys. 1.28-29.

<sup>502</sup> Lys. 1.30.

<sup>503</sup> Lys. 1.31.

### Dem. 23.53

If someone kills someone else unintentionally during athletic contests, or overcoming him on the road, or in war without being aware of it, or catching him in intercourse with the wife, the mother, the sister, the daughter or the concubine held for the purpose of free children, on that account the killer is not to flee into exile.<sup>504</sup> (trans. Canevaro)

The word which has been translated as ‘in intercourse with’ is *epi*, or catching a man on top of a wife, suggesting that just as with the Near Eastern adulterer, the Athenian *moichos* needed to be caught in the act.<sup>505</sup> Cantarella argues that this should be taken literally, and that the *moichos* must have been taken in the act of sexual intercourse.<sup>506</sup> She argues that as Euphiletus describes finding a naked Eratosthenes in his home with his wife, but not actually in the act of sexual intercourse, that the lawful homicide law would not have applied, hence his appeal to other laws to support his case.<sup>507</sup> Sealey also argues that an aggrieved husband must take an adulterer in the act, with witnesses to it. If he only caught him in his home, then he could only restrain him.<sup>508</sup>

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<sup>504</sup> Dem. 23.53. Whether the wording of the law as it appears in this speech is accurate or a later insertion, the discussion of it subsequently in the speech suggests that even if it is a forgery, it reflects the content of the original law. See Canevaro (2013), 64-70 for a discussion of scholarship and an examination of the authenticity of the law.

<sup>505</sup> In Lys. 13.66, when the speaker attempts to slander the defendant with an accusation of being a *moichos*, he makes it clear not just that he was a *moichos*, but that he had been *elephthe moichos*, ‘seized as a *moichos*’. The implication being that the proof of his guilt is that he was caught in the act. See also Lucian *Eunuch* 10.

<sup>506</sup> Cantarella (1991), 291-292.

<sup>507</sup> Cantarella (1991), 292.

<sup>508</sup> Sealey (1994), 110.

Scafuro notes the ambiguity of the term and suggests that much would be left up to the discretion of the *dikastai* in how they chose to interpret it.<sup>509</sup> Similarly, Kapparis argues that whether the couple were caught physically in the act would be an irrelevance in the Athenian legal system, as it would simply be up to each individual *dikastes* to decide whether the defendant had convinced them by the presentation of the whole of his case.<sup>510</sup>

Both Scafuro and Kapparis overstate the extent to which the discretion of the *dikastai* was not guided by substance of the law. Before the case came to trial, an Athenian litigant needed to demonstrate how the case matched one of the laws in the *polis*, so a defendant citing the lawful homicide law would have to match his defence to the law.<sup>511</sup> If *epi* literally meant on top of, the litigant would need to match this to be able use the lawful homicide law as a defence. However, the Near Eastern evidence does suggest that ‘in the act’ could be much broader than just physically in the act of intercourse. There is the example of the merchant from Mari who tied the adulterous couple to the bed and brought them both outside so that he could gather witnesses.<sup>512</sup> More pertinent to Euphiletus’ situation is the informal trial procedure envisaged by MAL A 15, in which a husband would need to gather

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<sup>509</sup> Scafuro (1997), 196. n.7.

<sup>510</sup> Kapparis (1995), 106.

<sup>511</sup> See Dem. 45.46 for an example of a counter-plea submitted at the pre-trial *anakrisis*, and Harris (2013), 166-173, for evidence that the Athenians both defined the key terms in their statutes and applied those definitions.

<sup>512</sup> LAPO 18 1064; Durand (1988), 524-525.

witnesses before executing the adulterous couple.<sup>513</sup> By the time these witnesses could have been collected any physical intercourse would have ended, but the circumstances in which they were would be sufficiently compromising to prove adultery. The speaker of Dem. 47.38 is at pains to point out that he entered the house of a man he knew not to be married. He had no designs on committing *moicheia* with anyone in the house, but simply entering would place him at risk if Theophemus was married.

The law at Dem. 23.53 does not mention *moicheia*, and nor is it a law about *moicheia*. It makes no attempt to either explain or define what the offence of *moicheia* is, and lacking any further qualifier, the circumstances envisaged by this law could as equally be applied to rape as to *moicheia*.<sup>514</sup> This contrasts with the Middle Assyrian Laws, which

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<sup>513</sup> Kapparis also cites an example found in Achilles Tatius, in which a husband discovered his wife in the company of another man and confined him for being a *moichos*; Ach. Tat. 5.23; Kapparis (1995), 107. This recalls the Sumerian wisdom literature which advised a man not to sit or laugh with another's man wife lest he be suspected of committing adultery with her; Alster (2005), 63; *Instr. Šur.* 33–34. However, as Achilles Tatius was writing in the second century C.E., it is questionable the extent to which he would be a reliable witness for Classical Athenian practice.

<sup>514</sup> That the law certainly did envisage *moicheia* as an offence which could justify a defence of lawful homicide is clear from Lysias 1. In its discussion of the five locations in which homicide cases were heard, *The Constitution of the Athenians* abbreviates this section of the law simply to *moichon labon*, or 'seizing a *moichos*'. This is the same phrase that Lys. 1.31 uses when discussing the law. That is not to say it was a law specifically on *moicheia*. As Harrison points out, it would be difficult for the offended man to determine whether consent had been given by the woman before exercising his right of self-help if rape was not punishable under this law; Harrison (1968), 34. Much later, Plutarch associates this law with Solon and expresses his confusion that he permitted a *moichos* caught in the act to be killed, but a rapist was only subject to a fine; Plut. *Sol.* 23. This claim echoes that made by Euphiletus that a rapist was only subject to a fine and is perhaps even dependent upon the same rhetoric; Lys. 1.32. Cole has hypothesised that the Athenians introduced another law subsequent to the one found at Dem. 23.53, and that this law did attempt to distinguish between *moicheia* and rape, leading to Lysias, Plutarch, and the author of *Ath. Pol.* to come

contain separate legislation for rape and for adultery, and the Hittite Laws and Deuteronomy, which both seek to determine whether the act was rape or adultery.<sup>515</sup> What is at stake in the latter case is the liability of the woman to punishment, but no punishment is mentioned here for the woman. There is no sense in this law that the wronged man could lawfully kill his wife if he caught her with a *moichos*. Consequently, there would seem to be no need for the law to attempt to distinguish whether the sexual intercourse was rape or *moicheia*. Either way, the man is liable to an on-the-spot execution, with no punishment for the woman.

Although Euphiletus' discussion of this law focuses on the right to kill a man caught in the act of sexual intercourse with a wife or *pallake* it also extended to a man caught with a mother, sister, and daughter as well. If sexual intercourse with an unmarried daughter was an offence of *moicheia* against her father, then it stands to reason that it was not only in instances of rape that the lawful homicide law applied to finding a man on top of a daughter, but of *moicheia* also. By extension, this further implies that mother-son and sister-brother relationships were also ones in which *moicheia* could be committed against the man. In

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to see the lawful homicide law as a law on *moicheia*; Cole (1984), 103. There is no evidence either that this later law exists, or that it influenced how the lawful homicide law was seen. See Harris (2006), 287, for a rebuttal.

<sup>515</sup> MAL A 12 for rape, and MAL A 13-15 for adultery. LH only legislates against the rape of a betrothed virgin, for which the penalty is death for the rapist; LH 130. Much as with Dem. 23.53, LH 129 does specify the circumstances in which a man could be found with another man's wife, meaning it could possibly be read in the same way. However, the reference to the punishment of the man being tied to the punishment of the wife suggests liability on her part, and thus is unlikely to be envisaging rape. See HL 197 and Deut. 22.23-27 for the laws defining whether intercourse should be considered rape or adultery.

the case of mothers, sisters, and daughters, it is unlikely to be the case that they would be regarded as such in reference to *moicheia* if they were married.<sup>516</sup> The offence there would almost certainly be to the husband. Consequently, and despite the fact it makes no mention of *moicheia*, it is this law which has most often been understood in modern scholarship as the law which defines the act of *moicheia*.<sup>517</sup>

This reading of *moicheia* to mean sexual intercourse with several different familial relationships, not just the wife, is largely accepted in modern scholarship. A vigorous challenge against it was made by David Cohen, who argued that important passages have been misinterpreted and other evidence ignored to arrive at a broader definition of adultery which is at odds with every other comparable society.<sup>518</sup> Cohen was followed by Todd, who considered his arguments to have ‘seriously undermined’ the view that *moicheia* extended to more than adultery, and Sealey repeated Cohen’s claim that there is no surviving evidence which demonstrates *moicheia* in any other relationship than a wife.<sup>519</sup> However, many scholars have rejected

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<sup>516</sup> See Ogden (1996), 138.

<sup>517</sup> See Cohen (1991), 100-101 for a discussion of earlier scholarship, and Kapparis (1995), for a restating of Dem. 23.53 as defining *moicheia* following Cohen’s objections.

<sup>518</sup> See Cohen (1984), 147-165; (1990) 147; and (1991), 98-109. Cohen acknowledges that the way other societies legislated adultery does not provide definitive proof that the Greeks did the same, but as Omitowojou observes, he places much weight on this argument because it helps him argue for the utility of comparative studies between Athens and other Mediterranean societies; Cohen, (1991), 102-103; Omitowojou (2002), 73. See Cohen (1990), 147-165, for a comparative discussion of Athenian adultery norms and those of surrounding societies.

<sup>519</sup> Sealey (1990), 28 n.52; Todd (1993), 227. Todd did later acknowledge that the affair of Epaenetus and Phano was a weak point of Cohen’s argument, but cites the compulsory divorce rule of [Dem.] 59.87 to argue that the Athenian norm of *moicheia* was adultery; Todd (2007), 48. Whilst accepting the broader definition,



the argument.<sup>520</sup> As Wolicki notes, critics of Cohen have tended to limit their criticism to a selective refutation of some of his arguments, with one or two weak points left to stand as a refutation of his entire argument.<sup>521</sup> Consequently, what follows is a brief discussion of Cohen's main points in favour of *moicheia* to mean adultery and nothing else.

As a starting point, Cohen attacked the interpretation of the lawful homicide law as a law which defined *moicheia*, and argued that there was nothing inherent to either the law or the discussion of it which proved that violations of all the familial relationships had to be *moicheia*, as rape and seduction could equally apply.<sup>522</sup> This argument was supported with reference to Euphiletus' discussion of the law, as

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Foxhall considered Cohen's arguments to be persuasive, and the evidence of Epænetus and Phano to be shaky, but stopped short of endorsing Cohen's argument completely, Foxhall (1991), 297-298.

<sup>520</sup> Cantarella provided a comparable example of *moicheia* with the *lex Iulia de adulteriis*, which uses *adulterium* to cover intercourse with married and unmarried women. Though it should be noted that the Romans did also have a separate term, *stuprum*, specifically for intercourse with an unmarried woman; see Modestinus D. 50.16.101.pr. As noted by Cantarella, this was not the case with the Greeks, as there was no other term in Greek for seduction than *moicheia*; Cantarella (1991), 295-296. See also Carey (1995), 407-408; Omitowojou (2002), 73-78.

<sup>521</sup> Wolicki (2007), 135. For example, see MacDowell (1992), 346.

<sup>522</sup> Cohen argues that Demosthenes makes specific reference to seduction at 23.54-55, and to rape at 23.56, but does not mention *moicheia* at all; Cohen (1991), 105. The mention of rape is rhetorical, as Demosthenes is not attempting to explain the purpose of the law, but to support the argument that Charidemus' person should not be made inviolable. Demosthenes is here attempting to show that even a friend can be killed if they act in the manner of an enemy, and thus the comparison is with a *hubristes*, as a *moichos* would not be appropriate. The discussion at 23.54 is about killing accidentally in an athletic contest, whilst at 23.55 the wording of the law is largely just repeated with regards to killing a man found on top of a woman. Even if it had specified seduction, it is worth noting that when Euphiletus makes the claim that the lawgiver regarded seduction as a more serious crime than rape, he does not refer to it as *moicheia*, even though his case is clearly one of *moicheia* and he is discussing this law, but as *peitho*, 'persuasion'; Lys. 1.32-33.

Cohen pointed out that this was done only with reference to a wife or *pallake*, and not to any other relationship.<sup>523</sup> He goes as far as to say that Euphiletus' entire discussion of the threat posed by *moichos* is unintelligible if *moicheia* was not adultery.<sup>524</sup> The main flaw in this argument is that whilst Cohen succeeds in demonstrating that the lawful homicide law was not specifically a *moicheia* law, and that *moicheia* certainly did encompass adultery, he failed to prove that *moicheia* could only be adultery. Similarly, a number of citations are also provided which Cohen claims demonstrate that *moicheia* was only ever used in reference to adultery, but these also only show that *moicheia* could be adultery.<sup>525</sup> For example, when the women who

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<sup>523</sup> Cohen further argued that if *moicheia* did also cover mother, sister, and daughter, then Euphiletus would have mentioned them alongside *pallake* as they would further to serve to underline his rhetorical point; Cohen (1991), 106. This is a circular argument as for that to be true, it would have to be the case that adultery was seen as the most serious violation, which is how Cohen sees it, but if they were all equally *moicheia*, then it would only be the *pallake* that Euphiletus could call on to make his point, as this would be the only one he could present as being an inferior relationship to that of a wife. As *Ath. Pol.* 57.3 also presents this law in terms of seizing a *moichos* without qualifying the relationship, Cohen must explain this away as adultery being the most common use of the law, despite being happy to cite the lack of reference to *moicheia* by Demosthenes in his discussion of the law as evidence it was not seen as such

<sup>524</sup> Cohen (1991), 107. Cohen presents examples such as this where *moicheia* is clearly adultery, as proof that *moicheia* was only adultery, whereas it in fact just demonstrates that *moicheia* could encompass adultery. The fear that an adulterer could cast doubt over the paternity of any children does not diminish if *moicheia* covered sexual intercourse with more than just a wife. As Harris notes, the people Euphiletus was trying to convince were themselves masters of their own households, and by using this rhetoric to play upon their own fears, he hoped to win them to his side; Harris (2006), 291.

<sup>525</sup> Such as Aristot. *Eud. Eth.* 1221b; Xen. *Hiero* 3.3. Complicating some of the examples is the use of *gune*, which can mean both 'woman' and 'wife'. Aristot. *Nic. Eth.* 1134a.19 is given as an example of *moicheia* directed against marriage, but it gives no context for how *gunaiki* should be read; Cohen (1991), 108 n. 29. See Lys. 3.23, where *gunaikas eleutheras* is used in the context of the speaker's female relatives, and the same words are used in the context of *moicheia* by the same orator at 13.66. Taken in isolation, the latter passage could be read to mean 'freeborn wives' and is translated as such in Lamb's 1930 translation of the speech (as 13.68), but the former passage demonstrates it could equally be

have barricaded themselves into the Akropolis swear that they will withhold sexual intercourse from both husband and *moichos*, it shows that if they allowed themselves to be seduced by a man other than their husband then that man would be a *moichos*, but it does not show that this is the only way a man could be a *moichos*.<sup>526</sup> Further, Cohen overlooks examples where *moicheia* is used in the broader sense, such as Aristophanes' *Birds*, and Menander's *Girl from Samos*, mentioned earlier.<sup>527</sup> Conversely the account of Epaenetus and Phano's affair proved to be a particular difficulty, as it directly contradicted his argument, and Cohen struggled to account for it.<sup>528</sup>

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'freeborn women', which is how Todd translates it in each instance. Lamb (1930); Todd (2000).

<sup>526</sup> Aristoph. *Lys.* 212. Cohen offers three citations from *Ecclesiazusae* as evidence that Aristophanes did not use *moichos* to describe the lover of an unmarried girl, but in fact none of them demonstrate that; Cohen (1991), 108, n.31. At 912ff., in which a young girl competes with an older woman for the sexual attention of a man, the women here are almost certainly prostitutes, and as Konstan points out, the mention of 'mother' by the young woman in the context of the genre means she is not under the power of a *kurios*; Konstan (2009), 59-60. 224ff. is a list of things that women in Athens continue to do. One of them is *bineo*, and there is mention of receiving a *moichos*, but nothing to suggest that Aristophanes distinguishes *moicheia* as an offence only committed with a married woman. 519ff. only concerns the married Praxagora and her husband's suspicion that she has been visiting a *moichos*.

<sup>527</sup> Scafuro surveys the usage of *moichos* and *moicheia* from the fifth to fourth century. She concludes that although the large majority of uses refer to adultery, there are some which clearly do not, and there likely would be more if it were not for a reticence to discuss young, unmarried women; Scafuro (1997), 474-478. See also MacDowell (1992) 346; Ogden (1996), 139; Schmitz (1997), 130; Wolicki (2007), 137-139.

<sup>528</sup> Cohen focused upon discrediting Apollodorus' reliability, pointing out that the account of Epaenetus and Phano was just a repetition of the same accusation he had earlier made regarding Neaira and the rich foreigners. Whilst this could well be true, the offence would still need to be *moicheia* with regard to Phano for Apollodorus' argument to have any force with the *dikastai*. He further offered the suggestions that Phano pretended to be married to entrap rich foreigners, and that as Phrastor had adopted the child he had had with Phano, that she would have been his *pallake*. Presumably suggesting that any *moicheia* that occurred would have violated this relationship, rather than Stephanos and Phano's; Cohen (1984), 154, n.15; (1991), 108-109, n.32. That Epaenetus offers his defence on Phano's relationship to Stephanos, and not any fictional husband,

Much earlier than Cohen, Lipsius had argued that *moicheia* in a legal sense only meant adultery, but in practice was extended beyond this.<sup>529</sup> Harrison built on this by suggesting that prior to Draco's time, *moicheia* only covered sexual intercourse with a wife, but by extension it came to be applied to the seduction or rape of unmarried women by the time the law on lawful homicide was written.<sup>530</sup> Wolicki accepts the broader definition but also accepts as valid Cohen's observation that in several classical texts, the discussion of *moicheia* inherently means adultery, making them the source of some ambiguity as to how *moicheia* should be understood.<sup>531</sup> He supports the arguments of Lipsius and Harrison, and notes that the word stems from a somewhat vulgar verb for urination, suggesting that *moicheia* means unacceptable sexual intercourse, giving the circumstances for which the broadening of the definition could arise.<sup>532</sup>

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strongly refutes the former point. The way in which the dispute between Stephanos and Epäenetos plays out suggests that the real crime was not *moicheia* against Phrastor. The result of the arbitration between the two men was that Epäenetos agreed to pay one thousand drachmas into Phano's dowry. This would seem an unlikely outcome if she was the *pallake* of Phrastor and the offence was against him; [Dem.] 59. 70. Ultimately, Cohen's arguments here repeatedly fall down because he fails to address why Apollodorus would present the affair to the *dikastai* as *moicheia*, if *moicheia* was only adultery. So inadequate an argument was this, that for some scholars it was sufficient on its own to dismiss all of Cohen's arguments; see Dover (1993), 658; Carey (1995), 407-408; Omitowojou (2002), 77.

<sup>529</sup> Lipsius (1905), 429.

<sup>530</sup> Harrison (1968), 36.

<sup>531</sup> Wolicki (2007), 139. Robson also suggests that the archetypal act of *moicheia* in the Classical Athenian imagination was adultery; Robson (2013), 93.

<sup>532</sup> Wolicki (2007), 139-140. Whilst Wolicki acknowledges that etymology cannot prove whether the terms originally only meant adultery and broadened over time, he suggests that adultery would always have been seen by the Greeks as vulgar sex, lending credence to Harrison's argument.

Whilst it is possible that this could be the case, and it would be very difficult to prove or disprove either way given the lack of sources pre-Drako, there would seem to be good contemporary grounds for why the Classical Athenians could frequently refer to *moicheia* as if it was adultery, whilst at the same time understanding it both in law and in practice to mean something broader. The first is that whilst a woman could be any or all of a wife, mother, sister, and daughter at any given time, if she was married then her husband would be her *kurios*, and thus the offence of the *moichos* would primarily be to him, regardless of her other relationships. The second is that it is only this relationship in which there would be violation of the right of exclusive sexual access to the woman on the *kurios*' part, and thus the threat the *moichos* posed would more directly bear upon his rights as a husband, with the additional threat posed to the legitimacy of his children.<sup>533</sup> It is noteworthy that after references to *moicheia* which treat it as adultery, the next most frequent references are to *moicheia* committed against the father of an unmarried daughter, whilst no source specifically discusses *moicheia* in the context of mothers or sisters only.

Regardless of the evolution of the term, there have been a number of attempts within modern scholarship to identify the single unifying factor that would cause the Athenians to group intercourse in all these relationships together as one offence, and not parse it out as their

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<sup>533</sup> This is a point specifically raised by Euphiletus and recalls Harris' argument that Euphiletus could play on the concerns of the *dikastai* over maintaining control of their wife and children when making the claim that seduction was a worse crime than rape; Lys. 1.33; Harris (2006), 290-291.

neighbours did. Paoli argued that it was aimed at allowing the Athenian man to prevent the introduction of illegitimate children into his household.<sup>534</sup> Whilst adultery did carry a fear that a father could not be sure if his children were his own, the children of other close female relatives could also stand to inherit from the household, thus their legitimacy would also be important. However, the lawful homicide law extended to a person caught with a *pallake* kept for the purpose of bearing free children, and by no later than the end of the fifth century, and certainly by the time of both Lysias 1 and Demosthenes 23, any children born to a *pallake* were regarded as *nothoi*, and they could not inherit.<sup>535</sup> As the lawful homicide law predates the legislation which specifically excluded *nothoi* from inheriting then it is possible that at the time it was drafted, children born to a *pallake* could inherit, and

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<sup>534</sup> Paoli (1976), 266.

<sup>535</sup> Dem. 43.51 and Isaeus 6.47 date a law which prevents *nothoi* from inheriting to the time of the archonship of Eucleides in 403/02. In the latter instance, the speaker's case is in part predicated on arguing that his rivals were the children of a *paidike* and thus *nothoi* who could not inherit even if they had been acknowledged; Isaeus 6.19. Half a century earlier, Perikles' citizenship law had already restricted Athenian citizenship to children for whom both parents were Athenian citizens; *Ath.Pol.* 26.3. Harrison suggests this citizenship law must have fallen into disuse, necessitating the law of 403-02, although in Aristophanes' *Birds*, staged in 414, Pisthetaerus tells Herakles that the law prevents him from inheriting from Zeus as he is a *nothos*; Aristoph. *Birds* 1650; Harrison (1967), 25-26. Patterson has argued that *nothoi* was usually used to refer to acknowledged children born to a *pallake*, as opposed to illegitimate children born of other circumstances. As a *nothos* had been recognised by his or her father, then their status as legitimate heirs was problematic, and thus needed to be legislated with regard to their inheritance rights; Patterson (1990), 69-70. Ogden, *contra* Patterson, argued that all illegitimate children were *nothoi*, but regardless of which is correct, it would leave the children of a *pallake* as *nothoi*, and thus not able to inherit. Harris sees the right granted to a man to kill another man found on top of his *pallake* as evidence that the production of legitimate heirs could not be a sufficient explanation on its own; Harris (1996), 329.

thus the unifying concern of this section of the law was the threat to inheritance posed by either the *moichos* or the rapist.<sup>536</sup>

For Cantarella, followed by Scafuro, that it remained part of the law into the fourth century is proof that this could not be the overriding concern of *moicheia*.<sup>537</sup> If it was, then as soon as legislation disinheriting *nothoi* was introduced, then seduction of a *pallake* would by definition have ceased to be *moicheia* the century before Euphiletus positively identified it as such.<sup>538</sup> Another possibility is that *moicheia* aligned with the rights of a *kurios* over the women under his *kurieia*. This was offered by Cole, who suggested that sexual intercourse by a woman under the *kurieia* of another man compromised both her and her family's reputation.<sup>539</sup> Similar to the objection raised against Paoli's argument, this understanding of *moicheia* was dismissed by Cantarella on the grounds that a *pallake* was not under the control of

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<sup>536</sup> See Harrison (1968), 12-13. It is noteworthy that Euphiletus presents his wife's infidelity as beginning after the birth of their son, leaving no room for the paternity to be questioned; Lys. 1.6; see Robson (2013), 99.

<sup>537</sup> Cantarella (1991), 293; Scafuro (1997), 197-198.

<sup>538</sup> Gardner recognises an Athenian concern over the paternity of children but does not see this as necessarily related to *moicheia*. She instead argues that a concern of being cuckolded, and of the wife becoming closer to the *moichos* than the husband, meant the main concern was of the *moichos* gaining access to the possessions of the husband via the wife; Gardner (1989), 51-62; and see also Finnegan (1995), 91-92. In doing so, Gardner discusses *moicheia* as if it were adultery only, and does not consider whether the argument could apply to the other relationships covered by *moicheia*. As a daughter or sister could fall under the *kurieia* of a father or brother, then it is possible that it could, although it would have to mean that the Greeks formed a conception of *moicheia* due to concerns of theft achieved through the seduction of any female member of the *oikos*, and not due to the intercourse itself. As Kapparis notes, *moichoi* are not usually presented as being motivated by financial gain; Kapparis (1999), 295-296.

<sup>539</sup> Cole (1984), 97-98. This has been recently restated again by Lanni: "The rationale behind permitting the use of self-help in sexual offences is similarly uncontroversial: it preserved the *kyrios*' prerogative to protect the house (*oikos*) from intrusion". Lanni also restated Paoli's argument that 'adultery' raises doubts about legitimacy and inheritance rights; Lanni (2016), 40-41.

her partner's *kurieia*, yet was covered by the lawful homicide law.<sup>540</sup> Further, the wording of the lawful homicide law does not specify whether it would be the case that the man would also have to be the *kurios* of the woman, or whether the relationship alone would be enough.<sup>541</sup> In the case of the wife, the man likely would be her *kurios*, but a brother would not be his sister's *kurios* if her father was alive. It may be that the stating of the relationship assumes *kurieia*, as will be seen below that was likely the case in Gortyn, and so would not be an insurmountable objection to understanding *moicheia* as a transgression to *kurieia*, at least with regard to relationships other than a *pallake*. Likewise, Isaeus 3.39 demonstrates that a father could give his daughter away to another man as a *pallake* and not just as a wife, suggesting that the *pallake* could live in the *oikos* under the control of its *kurios*.<sup>542</sup>

Against the objections of Cantarella and Scafuro to Paoli, unless the law was repealed and replaced, there would be no need to remove the part covering a *pallake*, even after laws were introduced excluding their children from inheriting, especially considering that this was not a law solely on *moicheia* to begin with. Euphiletus does identify intercourse with another man's *pallake* as *moicheia* when he discusses this law, suggesting that it was still seen as such in the fourth century, but it is

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<sup>540</sup> Cantarella (1991), 293.

<sup>541</sup> As noted by Scafuro (1997), 198 n.17.

<sup>542</sup> Sealey sees this as a regular and lasting union in which the woman was barred from sexual intercourse with other men, and that Athenian fathers would resort to this if they could not afford a sufficient dowry to be able to give their daughter away as a wife; Sealey (1986), 116-117.



difficult to know whether this was because it preserved the understanding of the offence pre-dating the laws on *nothoi* and inheritance, or because *moicheia* had never been primarily concerned with ensuring the legitimacy of all children in the *oikos* to begin with. Against the usual tendency amongst scholarship to seek a unifying element of *moicheia*, a speculative reading of the sources by Kapparis was used to try and reconstruct when different laws were introduced.<sup>543</sup> As part of this, he argued that the inclusion of the *pallake* would originally have been with the legitimacy of children in mind, as it long pre-dates Perikles' citizenship law. By the fourth century, after their children became *nothoi*, it remained as part of the lawful homicide law in recognition of a man's exclusive right of sexual access.<sup>544</sup>

In attempting to account for the *pallake*, Cantarella argued that the unifying element of sexual behaviour criminalised under the term of *moicheia* was that the women listed in the lawful homicide law lived within the house of the man who was allowed to kill their lovers.<sup>545</sup> Rather than a concern over the legitimacy of children, or transgressions against *kurieia*, *moicheia* was instead a transgression against the *oikos*, and an offence against the *time* of the head of the *oikos*. The lawful homicide law was a compromise between the concerns of the *polis* to control self-help by requiring trial procedures and the traditionally unlimited power of the head of the household over those who lived in his *oikos*, and specifically his ability to exercise that power within his

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<sup>543</sup> Kapparis (1995), 97.

<sup>544</sup> Kapparis (1995), 109-110.

<sup>545</sup> Cantarella (1991), 292-293.

*oikos*. Cantarella notes the emphasis Euphiletus places on Eratosthenes committing not only *moicheia* with Euphiletus' wife, but also *hubris* against Euphiletus by entering his *oikos*.<sup>546</sup>

This argument meets the significant objection that it reduced *moicheia* to an offence which could only be committed inside the house where the woman lived. If the woman left the house and had consensual intercourse with a man who was not her husband, then by this argument it could not be *moicheia*, and indeed would seem not to be an offence at all as no other law would cover it. This was not the case with regards to adultery in the Near East, as legislation there covered situations in which the woman left the home and went to a public place, to the home of the adulterer, in which she was in the countryside, and when she was travelling with another man, and even allowing for *moicheia* to be a broader offence than adultery, it seems highly unlikely it would be restricted in this way in Athens.<sup>547</sup> A strong suggestion that it was not is found in Aristophanes' *Ecclesiazusae*, in which a husband suspects his wife has been visiting several *moichoi* during a period of time in which she was away from his *oikos*.<sup>548</sup>

Much as with a possible implicit connotation of *kurieia*, it could be that the lawful homicide law implicitly meant that the killing could only take place if the *moichos* was caught in the house in which the woman lived, which would salvage Cantarella's interpretation of that law, if

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<sup>546</sup> Lys. 1.4, 1.25.

<sup>547</sup> See LU 7; MAL A 13, 14, 22; HL 197; Gen. 20.2-9; Deut. 22.23-27.

<sup>548</sup> Aristoph. *Eccl.* 519-524.

not her definition of *moicheia*. In fact, if that were the case then it would undermine any attempt to derive a definition of *moicheia* from the law, as they would represent two separate, if overlapping, concerns. As Euphiletus provides the only surviving example of such a killing, it is difficult to know how much weight to place on his emphasis of Eratosthenes' *hubris* in entering the *oikos*, but it is notable that in his discussion of the lawful homicide law, he does not discuss where the act must take place. Instead, he discusses only that the *moichos* must be discovered *epi damarti*, as per the wording of the law.<sup>549</sup> If it was a requirement that it be in the *oikos* as well, it would seem likely Euphiletus would emphasise that he complied with this requirement too.<sup>550</sup>

Another potential unifying factor appears to be the impact it has on the suitability of the woman as a current or prospective wife. In the story of Aphrodite's affair with Ares in the *Odyssey*, Hephaistos demands the return of the gifts he had given Zeus in exchange for Aphrodite's hand in marriage.<sup>551</sup> Aphrodite's infidelity lessens her value to Hephaistos as a wife. Further, the fine Ares must pay Hephaistos is described as a *chreos*, a debt, which he now owes Hephaistos.<sup>552</sup> As opposed to the example of Neleus, who takes three hundred cattle and

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<sup>549</sup> Lys. 1.30.

<sup>550</sup> Euphiletus does anticipate that his opponents will claim that he snatched Eratosthenes out of the street, though this would seem an argument designed to show Eratosthenes was not caught in the act, rather than he must have been in the *oikos* to be liable to a lawful killing; Lys. 1.27. This would also further reinforce that 'in the act' did not have to mean actually in the act of sexual intercourse, and that in the *oikos* could be grounds for being caught in the act.

<sup>551</sup> Hom. *Od.* 8.318-319.

<sup>552</sup> Hom. *Od.* 8.353, 355.

sheep as repayment for a *chreos* owed over prize winning horses that were taken from him, Ares cannot repay Hephaistos in kind for the diminished value of Aphrodite as a wife, and so a compensatory payment stands in its place.<sup>553</sup> Similarly, Eratosthenes offered a compensatory payment when he was caught with Euphiletus' wife.<sup>554</sup>

In the story of Epäenetus and Phano, if Apollodorus' account is to be believed, then the result of the arbitration was Epäenetus' agreement to pay one thousand drachmas into Phano's dowry.<sup>555</sup> The amount Stephanos originally asked for was thirty minae, which is the exact amount Apollodorus claims that Phrastos withheld when he refused to return Phano's dowry to Stephanos.<sup>556</sup> Despite Apollodorus' characterisation of the events, the money that Stephanos eventually received from Epäenetus was for her dowry, not to fund his lifestyle, and it is not inconceivable that the original amount asked for was intended to replace the entire dowry. Presumably, without replacing at least some of the lost dowry, Stephanos could not have arranged Phano's subsequent marriage to Theogenes.<sup>557</sup> Likewise, Nikaretos imposes no punishment upon Moschion when he learns of the affair with his daughter, but that is because Demeas assures him that Moschion means to go ahead with the wedding.<sup>558</sup> In fact, the only instance in which Nikaretos refers to Moschion as a *moichos*, is when

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<sup>553</sup> Hom. *Il.* 686-702.

<sup>554</sup> Lys. 1.29.

<sup>555</sup> [Dem.] 59.70-71.

<sup>556</sup> [Dem.] 59.50-52.

<sup>557</sup> It was not a legal requirement to provide a dowry, but the lack of a one would have made Phano far less desirable as a prospective wife.

<sup>558</sup> Men. *Samia* 558-600.

he mistakenly believes that Moschion plans to join the military instead of marrying Nikaretos' daughter.<sup>559</sup> Among the accusations made against Lycophron, is that he is a *moichos* who causes women to grow old unmarried, the implication being that *moicheia* committed by an as yet unmarried woman renders her unsuitable for any potential husband, and who instead remains in the home of her father who cannot arrange a marriage for her.<sup>560</sup> So whilst *moicheia* against a husband risked diminishing the value of an actual wife, due both to her granting of sexual access to someone other than her husband and the doubt it cast over the paternity of any children, *moicheia* against an unmarried daughter risked her value as a potential wife, and thus the father's ability to find her a husband.<sup>561</sup>

The diminished value of the daughter as a potential wife is also found in Near Eastern legislation. In Deuteronomy, the man who lies with an unmarried virgin daughter is to pay fifty shekels to her father, marry her, and cannot divorce her.<sup>562</sup> At LL 33, falsely accusing a man's

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<sup>559</sup> Men. *Samia* 717.

<sup>560</sup> Hyp. 1.12, 1.15. Preceding this section, it appears that Lycophron also answers a charge that he followed a woman on her wedding day and encouraged her to remain faithful to the oath she had sworn him; Hyp. 1.3-7. Due to the fragmentary nature of the text it is difficult to know exactly what is envisaged here, but as Lycophron's defence against this accusation is that her husband would not have gone through with the wedding ceremony had it been true, it suggests that he was being accused of some sort of relationship with the woman. One which if true, would have rendered her unsuitable as a wife.

<sup>561</sup> Plutarch states that Solon passed a law that prevented a man from selling his unmarried sister or daughter into slavery unless she had lost her virginity; Plut. *Solon* 23. Ogden sees the primary purpose of this law as to protect the integrity of bloodlines in the state, but there is no sense that children have been produced, her lost value as a potential wife would seem the more likely reason; Ogden (1996), 141. However, as Plutarch is the only source for this law, and there is no evidence of it being in force during the Classical period, significant doubt is cast over its veracity.

<sup>562</sup> Deut. 22.28-29.

unmarried virgin daughter of having had sexual intercourse results in the accuser paying the father a fine of ten shekels. Other than a deterrent, the obvious other reason for the fine is the slander risks diminishing her value as a prospective wife. According to Roth's translation, a law found on a Sumerian exercise tablet states that a man who deflowers the unmarried daughter of another man, the parents are to give her in marriage to him if he declares he will marry her.<sup>563</sup> LH 156 covers a situation in which a father selects a bride for his son, and then has sexual intercourse with her before his son does. He is required to pay her a fine of thirty shekels, restore her dowry, and allow her to marry someone else. Again, her value as a potential bride has been diminished, and she gains both an increased dowry and the freedom to marry outside of her intended husband's household. At LH 159, if a man pays the bride-price to his prospective father-in-law, but then decides to marry someone else, the father-in-law can keep the bride-price. The same law is found at HL 30.

Whilst the Near Eastern father had the responsibility for arranging his daughter's marriage, LL 23 requires the brothers of an unmarried woman to arrange her marriage if her father is dead. There are several Classical Athenian lawcourt speeches which demonstrate that this was also the responsibility of an Athenian brother if his father had died.<sup>564</sup>

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<sup>563</sup> SLEx 7. See Roth (1995), 44 and 45 n.4.

<sup>564</sup> Euxitheus relates in a lawcourt speech how his mother was twice given away in marriage by her brother; Dem. 57.40-41. The speaker of Lys. 13.45 claims that Agoratus' denunciations resulted in brothers being killed before they could arrange a marriage for their sisters. At Is. 2.3-9, the speaker recounts three instances of arranging the marriage of his sisters.

The lost value of a woman as a current or potential wife was present in both societies, but whereas Near Eastern societies defined them as different offences, with an emphasis placed upon the liability of both the wife and the lover in the case of adultery, and an emphasis placed on the liability of the seducer if the woman was either unmarried or not betrothed to be married, in Classical Athens they were both grouped together under the single offence of *moicheia*, with the primary focus of the offence being that of the *moichos*, as opposed to the seduced woman.

Here again, however, the presence of the *pallake* as a *moicheia* relationship resists efforts to locate a unifying element, as they could not be a wife and thus held no intrinsic value as one. Whilst a dowry was not mandatory to conclude an Athenian marriage, the speaker of Isaeus 3 attempts to prove that his deceased uncle's partner was a *hetaira* rather than a wife in part by demonstrating that her brother had provided his uncle with no dowry.<sup>565</sup> Without a dowry she had no value as a wife, and thus must not have been one. However, although their positions were similar, it may have been the case that a *pallake* kept for the purpose of having freeborn children did differ from a *hetaira* in that when they were given to another man, some form of payment that functioned like a dowry was also provided at the same time. The same

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<sup>565</sup> Isaeus 3.8-14. In noting that a dowry was not mandatory, Edwards suggests that if the speaker's characterisation of the woman as having previously been sexually available is correct, then it may have been the case that her brother was happy to find her a husband wealthy enough not to need a dowry, even if he risked allowing him to freely divorce her with no financial consequences; Edwards (2007), 44. See also [Dem.] 40.22.

speaker of Isaeus 3 claims later in the speech that those who give their women away as *pallakai* do so along with gifts of an arranged amount.<sup>566</sup> So even if a *pallake* could not be a wife, nor provide legitimate heirs, then as she lived with a man in much the same way as a wife, was given with a payment to her partner that approximated a dowry, and was expected to bear him freeborn children, then *moicheia* could have extended to the seduction of her in recognition that she had value as per a wife.

In addition to the *pallake*, the protection of the mother-son relationship afforded by the lawful homicide law is a further point against the marriageability of the woman as being the unifying element of *moicheia*. If the woman was a widow and had an adult son, then even if her father was alive she could remain in her husband's household and be under the *kurieia* of her son, but it is unlikely that the son who had come of age and inherited would arrange the remarriage of his mother.<sup>567</sup>

Returning to the Near Eastern evidence for the rights and obligations of the father, MAL A 55 covers the circumstance in which a man rapes rather than seduces an unmarried woman. The father can impose a fine

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<sup>566</sup> Isaeus 3.39. MacDowell directly equates this with a dowry; MacDowell (1978a), 90.

<sup>567</sup> Widows with sons certainly could remarry. The widow of Diodotus had two sons, and married Hegemon with whom she had another son. However, the sons of Diodotus were not of age when she remarried, and the marriage was arranged by her father using a dowry left by Diodotus; Lys 32.4-8. The speech demonstrates the problems that remarriage could bring to the sons of a previous marriage, as the plaintiff finds himself effectively marginalised and forced to call on his brother-in-law for support. See also Dem. 45, where the speaker's father arranged for his widow's remarriage, and the similar situation it placed the speaker in.



of three times the value of his daughter, and if the rapist is unmarried he can force him to marry his daughter. If he is married, then he can impose a talionic punishment and have the man's wife raped. MAL A 56 covers seduction but does not consider whether the seducer is unmarried. In this case, whilst the seducer does not have to hand his wife over, he still must pay the father three times the daughter's worth. As this law does not deal directly with the unmarried man, it is unclear whether there would remain a requirement for him to marry the daughter if the father so wished. It is notable that whilst MAL makes a distinction between whether the daughter was raped or seduced in how it chooses to punish the offending man, in both cases the offence is conceived of as being towards the father, to the extent that when talion is applied, the corresponding penalty is the rape of the man's wife, not a punishment directly inflicted on the rapist himself. It is not conceived of as a crime against the daughter when she has not given her consent.

A survey of the Athenian evidence by Harris suggests that the situation was similar there also. In Menander's *Dyskolos*, Gorgias suspects Sostratus of intending to have sex with Gorgias' sister. Gorgias can equally conceive of the act occurring through persuasion or force, but in either case there is no distinction in how he perceives the offence, which is as a wrong done to him.<sup>568</sup> As Rosivach demonstrates from a study of New Comedy, the rape of an unmarried daughter often results in a lenient treatment of the offender if he agrees to marry the

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<sup>568</sup> Men. *Dyskolos* 289-298. Harris (2006), 311-312.

woman.<sup>569</sup> From these, Harris also suggests that Moschion's glossing over of the events which led to the pregnancy of Nikaretos' daughter, and his shame at them, suggests the daughter was not at fault, whilst Rosivach assumes it was a rape as it fits a trope of the genre.<sup>570</sup>

If this passage should be understood as rape, then this would cast the later use of *moichos* to describe Moschion in a different light. It was noted earlier that Moschion's decision to marry Nikaretos' daughter is what assuaged Nikaretos' anger. If the offence to the father was not dependent on the daughter's consent, and marriage was the appropriate action regardless of consent, then it does present the possibility that *moicheia* covered both seduction and rape. Likewise, it could explain why *The Constitution of the Athenians* could abbreviate this part of the lawful homicide law to seizing a *moichos*. A view that *moicheia* covered both seduction and rape is expressed in modern scholarship by both Harrison and Sealey, and in each man's case this is seemingly based upon the lack of any distinction of the circumstances of the act in the law on lawful homicide.<sup>571</sup> In another source, this time a legal speech, Alkibiades is described as a *moichos* who 'harpages' the wives or women of others.<sup>572</sup> The word has connotations of rape, and of

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<sup>569</sup> Rosivach (1998), 14-23. See also Harris (2006), 325.

<sup>570</sup> Harris (2006), 301; Rosivach (1998) 20-21. See Men. *Samia* 47-51.

<sup>571</sup> Harrison (1968), 36; Sealey (1990), 28. Cole also suggests that, based on the lawful homicide law, it may have been the case that *moicheia* could cover circumstances in which the woman did not consent; Cole (1984), 101. Foxhall sees *moicheia* and rape as being legally equivalent, though not that rape is considered *moicheia*; Foxhall (1991), 301.

<sup>572</sup> Andoc. 4.10.

seizing women as if they were booty, suggesting that the consent of the woman is not important to whether he is a *moichos*.<sup>573</sup>

Lys. 1.33 does suggest, however, that there was a distinction between *moicheia* and rape, as the *moichos* there is specifically cast as one who takes a woman through persuasion, and not through force. Caution should be exercised, as Euphiletus would have a motive for obfuscating here if *moicheia* did cover both seduction and rape, as that would undermine the argument that rape was not punishable by death. However, and similar to Apollodorus, it would also mean Euphiletus would have to be redefining a common understanding of *moicheia* and expecting the *dikastai* to accept it. Further support is found in the Gortyn Law Code, where legislation on rape is placed next to legislation on *moicheia*, with similar penalties for each.<sup>574</sup> Without clear examples of rape being regarded in Athens as *moicheia*, and Moschion's affair with Nikaretos' daughter is not clear as to its circumstances, coupled with the positive evidence of Lys. 1.33, it seems much more likely that it did not cover rape but was simply seduction.<sup>575</sup>

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<sup>573</sup> See Aesch, *Ag. 534, Seven 351*; Hdt. 1.2, 5.94; Xen. *Cyrop.* 7.2.12.

<sup>574</sup> G. 72.2.2-28.

<sup>575</sup> From a survey of some of the evidence on *moicheia* and sexual assault, Cole concludes that the Athenians did distinguish between the two in both procedure and penalty. She does speculate that a law which distinguished rape from *moicheia* was introduced in Athens sometime between Draco's lawful homicide law and the speeches of Lysias and Demosthenes, which in turn caused the former to come to be known as a law on *moicheia*. This would mean that the Athenians of the fourth century did distinguish between rape and *moicheia* with regards to the lawful homicide law. However, there is no evidence either for the introduction of a new law, nor for it causing any change in understanding of the lawful homicide law; Cole (1984), 100-103. In the case of Nikaretos and Moschion, Scafuro argues that Nikaretos' is not a reliable witness for Athenian

A distinction between *moicheia* and rape is seen by Foxhall, who also follows Cantarella in emphasising the transgression against the control exerted by the head of the *oikos* as the unifying element of *moicheia*, though she groups them together as largely equivalent offences against the man under whose control the woman was.<sup>576</sup> As Harris has shown, ‘rape’ in the modern understanding of the offence did not exist in the same way in Classical Athens.<sup>577</sup> Whilst it did require a lack of consent on the part of the woman, it did not concern itself with the woman’s right to control who her sexual partners would be, nor the impact upon her, but instead it was concerned with the effect on men’s power and honour.<sup>578</sup> For Foxhall, as the offence was to the man, then the woman’s consent was not important, and the offence, and thus the punishment, was effectively the same.

In this regard, Foxhall’s view risks making the offence so broad that it is difficult to know why there would need to be separate legal terminology for *moicheia* and rape, when a single offence would have sufficed. The obvious differential would lie in whether the woman should be punished, which is the legal distinction drawn between adultery and rape in Deut. 22.23-27 and HL 197, though even this is problematic. Foxhall claims that a woman with a *moichos* had taken control of her sexuality, and had taken it away from the man who

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terminology, and thus his use of *moichos* here is not to be taken as such, though this does leave the question as to why Menander decided to put the word in his mouth; Scafuro (1997), 437.

<sup>576</sup> Foxhall (1991), 299-300. Note that she does disagree with Cantarella on the location needing to be within the man’s *oikos*.

<sup>577</sup> Harris (2006), 297-332.

<sup>578</sup> Harris (2006), 330.

dictates her sexuality, noting that “no wonder her husband was required to divorce her, for she is effectively removed from the community of obedient women”.<sup>579</sup> If this were true then this would mean *moicheia* is adultery, as the woman would return to her father’s *oikos*, and if she was not married there would be no punishment. If it was not the case, and the law is almost certainly a forgery, then it becomes difficult to know where the line would be drawn between the two.<sup>580</sup>

Reference to the law code at Gortyn helps shed some light on what *moicheia* was:

#### **Gortyn Law Code 72.2.20-27**

“If someone is caught committing *moicheia* with a free woman in her father’s, brother’s, or husband’s house, he will pay a hundred staters. And if in someone else’s house, fifty. And if (he is caught committing *moicheia*) with the woman of an *apetairos* (he will pay) ten. And if a slave with a free woman, (he will pay) double. And if a slave with a slave’s (woman), five (staters).” (trans. Gagarin)<sup>581</sup>

The code most likely dates from the fifth century, so is roughly contemporary with the Athenian sources.<sup>582</sup> There are some important

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<sup>579</sup> Foxhall (1991), 302.

<sup>580</sup> Plutarch’s previously cited ‘law of Solon’ could be how a father would punish a daughter or brother a sister, but there is no evidence it was in effect in the Classical period, if it ever was; Plutarch *Solon* 23.

<sup>581</sup> With amendment of ‘adultery’ to ‘*moicheia*’.

<sup>582</sup> As the date of composition of the laws is not known, it could be that the *moicheia* laws are earlier, though there is no evidence that any earlier law was copied into the code. Gagarin sees the collection as containing both changes and continuity from previous laws; Gagarin and Perlman (2016), 336.

differences, which in the main will be looked at in greater detail in the section on punishments, but for now the most noteworthy element is that once again, *moicheia* is presented as covering more than just the violation of the marital relationship. The locations which carry the greatest fines are the house of the father, husband, and brother, and whilst it could be the case that these are places a wife may take a lover to, it is much more likely to be the case that these are relationships that were covered by the offence of *moicheia* in Gortyn.<sup>583</sup> It is unclear exactly what the status of an *apetairos* was. As there is a separate entry for slaves then they were likely free persons, especially as there was a fine for committing *moicheia* with an *apetairos*, but as the fine was much lower here, then they were probably not full citizens.<sup>584</sup> Nor is it clear whether this clause referred specifically to the wife of an *apetairos*, as Gagarin translates, or a woman who was of the status of *apetairos*.<sup>585</sup> The former would suggest that for a male *apetairos*, *moicheia* was the same as adultery, whereas the latter suggests any sexual intercourse with a female *apetairos* was *moicheia*. It may be that the same relationships mentioned for a free woman are implied for the female *apetairos* and given the otherwise broader definition of *moicheia* found for free women and in Classical Athens, it seems likely

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<sup>583</sup> Sealey sees the offence here as simply adultery, although does not consider any alternative. Consequently, he suggests that unmarried women are not covered by the *moicheia* laws because consent to intercourse by the woman was the same as consent to marriage, and hence no offence could have taken place; Sealey (1990), 73-74.

<sup>584</sup> See Willets (1967), 12-13, for a review of who the *apetairos* may have been.

<sup>585</sup> Along with Gagarin, both Willetts and Lefkowitz translate to mean the wife; Lefkowitz and Fant (2016), 55; Willetts (1967), 58-59. *Contra* to this are Paoli (1976), 510; Effenterre and Ruzé (1995), 294-298; Wolicki (2007), 141-142.

that wife is not the intended meaning. Interestingly, *moicheia* in Gortyn extended to intercourse with a female slave by another slave.<sup>586</sup>

Noticeable by its absence here is any sense that *moicheia* extended to offences committed with a mother, or with a *pallake*. It may be that the reduced fine for committing *moicheia* in someone else's house could cover a widow who lived with her son, and thus make that *moicheia* in Gortyn, but it would seem more likely that it refers to a woman committing *moicheia* away from her own home. This could be because the offence is not as great to the woman's husband, father, or brother if the *moichos* does not enter the household to commit the act, but comparison with Near Eastern legislation suggests it may be because the *moichos* would not be automatically expected to know the exact status of the woman if the act took place away from her home.<sup>587</sup> As

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<sup>586</sup> That some form of union between slaves was available in Gortyn is beyond doubt, though whether this was marriage is debated. Lewis argues against the right of slaves in Gortyn to marry or own property, preferring to see these 'marriages' in terms of servile unions, in which the slaves have no rights; Lewis (2013), 390-416. For an opposing view see Gagarin and Perlman (2016), 79-84. Of interest here is less whether slaves could marry, as how a male slave could commit *moicheia* with a female slave, and who the offence would be against. Gagarin and Perlman translate *moicheia* as adultery and assume from this that this clause represents proof that slaves could marry, though the implications of the broader definition of the term are not explored in this regard, despite being accepted by them when discussing the preceding part of the text; Gagarin and Perlman (2016), 350. The fine here is five staters, though who it is paid to is not clear. Laws on the children of unmarried women suggest that children born to slaves would be the property of their owners, not of the slaves, and the slave woman would obviously be owned also, regardless of whether she was in a union with another slave; G.72.3.53-4.23, and see also G.72.6.56-7.10, wherein children born to a male slave and a free woman are themselves considered to be slaves. As there is similar ambiguity as to the identity of the female slave as to the identity of the female *apetairos*, then if she is not to be considered as a 'wife' the offence would seem to be to the slave's owner. If she is to be considered a 'wife', then *moicheia* is only adultery here, which given the broad use of *moicheia* both here in the code and elsewhere would seem unlikely.

<sup>587</sup> LU 7; MAL A 14. It should be noted that the adulterer here is absolved of any blame if he did not know the woman was married, whereas as there is still a

this leaves only the husband, father, and brother as the relationships against which *moicheia* can be committed, and as the Athenian evidence demonstrates that these are the relationships in which a woman's current or potential status as a wife is at stake, then the absence of mention of son or *pallake* would be expected if this was a unifying feature of *moicheia*.<sup>588</sup> Against this, there is room for doubt over whether women at Gortyn would be under the legal control of their sons, or even of a *kurios* at all, as they may have been able to inherit a half-share of their parents' estate, and the legal authority to act for themselves in manner that an Athenian woman would require her *kurios* to do for her.<sup>589</sup>

Whilst the same argument from silence that Cohen used to argue that the lawful homicide law may have meant *moicheia* in some instances and not in others could be applied to argue that Athens was in line with Gortyn, and that *moicheia* did not apply in the case of a mother; as this relationship is present, and the others are *moicheia*, there is no good

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punishment in Gortyn, albeit a reduced one. Sealey sees this circumstance as a mitigating factor in the offence against the householder's authority rather than down to the man's knowledge of the woman's status; Sealey (1990), 73.

<sup>588</sup> Wolicki agrees that the significance of the stated locations was in the relationships they denoted but attaches no significance to the omission of the son's house and argues that it may have been excluded as the legislator found *moicheia* with a person's mother unlikely; Wolicki (2007), 141 n.38. If true, then this would mean *moicheia* with a mother was effectively legislated out of the Gortyn Law Code. If it were considered *moicheia*, then it would seem unlikely that it would be omitted.

<sup>589</sup> Such as choose a husband (6.55-7.10) and be a plaintiff (6.12-31). Maffi sees the half-share of the inheritance as setting the amount of the woman's bridal gift and argues that the Gortyn woman would have been under the control of a *kurios*, much like an Athenian woman, with very limited powers to act or own property; Maffi (2003), 182-201. For arguments in favour of the absence of *kurieia* in Gortyn see Gagarin (1994), 61-71; Gagarin and Perlman (2016), 84-87; Link (2004), 44-93.



reason not to suspect that Athens did differ from Gortyn in this respect. In the absence of any evidence to the contrary, it is most likely to be the case that Athenians did consider sexual intercourse with a mother to be *moicheia*. That Euphiletus does positively identify intercourse with a *pallake* as *moicheia*, suggests that whilst the woman's value as a wife was important, it could not be an all-encompassing explanation for which situations the Athenians considered *moicheia*. Similarly, nor can Paoli's argument that the unifying feature was the risk of any illegitimate children being born into the household, nor Cantarella's argument that it was the act taking place within the household that made it *moicheia*.

*Moicheia* in Classical Athens resists attempts to classify it by any single unifying quality. It was often mentioned in a context equivalent with adultery but was clearly more than just adultery. It damaged the woman's value as a wife but covered both mothers whose adult sons would not be likely to want to arrange a marriage for them, and *pallakai*, whose partners would have no interest in their value as a wife. It threatened the legitimacy of any children born into the household, but covered intercourse with women who could not produce legitimate heirs. It is possible that the consent of the woman was irrelevant to whether the intercourse was *moicheia*, though the balance of the evidence suggests that the woman did need to consent. The most coherent understanding may be that it impacted all women under the control of a *kurios*, even a *pallake* living with him in a manner similar to a wife. The result is that *moicheia* was a malleable term that could

be stretched to cover several different, yet intermittently overlapping circumstances. Whilst there is not as much evidence from Gortyn, *moicheia* there seems more straightforwardly to cover the narrower range of wife, daughter, and sister relationships. As adultery in the Near East was a much more narrowly defined offence, it has implications for comparing legislation on *moicheia* to legislation on adultery, which will become apparent in the subsequent sections.

#### Punishments for *Moicheia*

As has been seen in the examples of Eratosthenes and Epænetus, a *moichos* caught in the act could be killed on the spot, though the aggrieved man would be wise to gather witnesses before doing so, and he could be subjected to a financial penalty. Euphiletus states at the end of his speech that the person who catches a *moichos* in the act could treat him as he pleased.<sup>590</sup> A similar claim is found at Isaeus 8.44, whilst Xenophon claims that the *moichos* who enters the house of another can be caught and subjected to *hubris*.<sup>591</sup> It is again in Euphiletus' interests to present the laws on *moicheia* in a way that justifies his actions, and he cites no law in support of his statement, but the law mentioned in [Dem.] 59.66 may provide some context. This law allowed for someone seized as a *moichos* to bring a charge of unlawful imprisonment against his captor on the grounds that the

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<sup>590</sup> Lys. 1.49.

<sup>591</sup> Xen. *Mem.* 2.1.5.

charge of *moicheia* was false. If he won the case, then he was considered innocent of the charge and immune to punishment, if he lost then he was turned over to his captor to do whatever he wished, as long as he did not use a knife.

It is not clear exactly what is intended by the restriction of not using a knife. Taken literally, it would leave open enough alternatives to the captor as to render the restriction pointless, so it must be a signifier of something the captor could not do.<sup>592</sup> Kapparis sees this as part of a broader restriction on killing a *moichos*. Outside of the circumstances permitted by the law on lawful homicide, which required any execution to be immediate, and having first caught the person in the act, Kapparis believes that a *moichos* could not be subject to the death penalty based on his reading of this law.<sup>593</sup> Similarly, Cole thinks this restriction meant that the captor probably could not kill the *moichos*.<sup>594</sup> Carey sees the restriction as signifying the captor has passed on his opportunities to kill or wound by agreeing to the payment, and thus cannot now inflict them.<sup>595</sup> This does beg the question as to why the captor would not be forced to accept only a payment if his agreement to it means he has

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<sup>592</sup> Paoli did see this as a minimal restriction on the captor and argued that he could inflict punishments on the *moichos* that included a slow and painful death by torture; Paoli (1950), 149.

<sup>593</sup> Kapparis sees the law of [Dem.] 59.66 as having general application in cases of *moicheia*, rather than just the specific instance of false imprisonment, and believes it to be a law of Solon introduced to allow a more lenient punishment than execution; Kapparis (1995), 116, and (1996), 65. Cohen goes further than Kapparis in his attempt to argue that *moichoi* were also *kakourgoi*, and suggests that the husband could not kill the *moichos* even when taken in the act; Cohen (1984), 158.

<sup>594</sup> Cole (1984), 104.

<sup>595</sup> Carey (1992), 119.

waived his rights to other punishments. Cohen discusses three possibilities meant by this restriction.<sup>596</sup> The first is that the right to kill is restricted in the same manner as Kapparis proposes, and this was because the law recognised the unique set of circumstances a man found himself in at that moment when he discovered a *moichos* on top of a woman under his control. Once that moment had passed, the right to kill the *moichos* had also passed. The second is that there was no right at all to kill. If the man wanted the *moichos* to be killed, he had to take him to the Eleven to request his execution. The only punishment he could impose himself was a financial penalty. The third is that the phrase had no set meaning, and was ambiguous, free to allow litigants to argue as suits them best, and the particular group of *dikastai* on that day to decide how they wished to apply it.

There is no evidence supporting the last of these hypotheses, which places too great an emphasis on the discretion of the *dikastai*, and it is noteworthy that Euphiletus does not support the legality of his act by claiming he did not use a knife to kill Eratosthenes. The second of Cohen's hypotheses is dependent upon an argument made by him and several other scholars that *moichoi* were considered to be *kakourgoi* in Athenian law.<sup>597</sup> The *kakourgoi* were certain classes of criminals who,

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<sup>596</sup> Cohen (1991), 116-118.

<sup>597</sup> See Paoli (1950), 152; Hansen (1976), 36-48; Cohen (1984), 156-163, and (1991), 110-122; Cantarella (1991), 291-292; Todd (1993), 276-278. Cohen goes as far as to attempt a reconstruction of what he sees as the law on *moicheia* based on his belief that *moichoi* were *kakourgoi*, coupled with his belief that the law of [Dem.] 59.87 is missing a first section discussing the *moichos*; Cohen (1991), 121. Leaving aside the fact that the association of *moichoi* with *kakourgoi* has no evidence to support it, the law of [Dem.] 59.87 is simply the law on

if caught in the act, were subject to the *apagoge* procedure of summary arrest in which they were taken to the Eleven, who executed them if they confessed to the crime, and who were taken to a lawcourt for trial if they denied it.<sup>598</sup> Only three classes of criminal are stated in any Athenian source as being *kakourgoi*, and *moichoi* are not among them. At Aesch. 1.90, *moichoi* are listed alongside one class of *kakourgoi*, the *lopodutes*, as types of criminals who are killed if caught in the act and tried if they are not. The similarity of this to the *apagoge* procedure is clear, and Aeschines does use the term *kakourgountes* in relation to them.<sup>599</sup> However, there is nothing in the passage that would not be covered by the lawful homicide law in the case of *moichoi*, and as Harris points out, there is no mention of *apagoge*, and nor does *kakourgountes* carry the technical meaning of *kakourgoi*.<sup>600</sup> It leaves the association of *moichoi* with *kakourgoi* as purely speculative, and coupled with the lawful homicide law and the killing of Eratosthenes, there is no evidence that a *moichos* caught in the act would have to be taken to the Eleven for execution.<sup>601</sup>

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women taken by a *moichos* found at Aesch. 1.183, and is not a comprehensive law on *moicheia*. See below for a discussion of [Dem.] 59.87.

<sup>598</sup> *Ath. Pol.* 52.1.

<sup>599</sup> Aesch. 1.189.

<sup>600</sup> Harris (2006), 291-293.

<sup>601</sup> See also Harrison, who regards the evidence as slight, and Scafuro who states the proposal is attractive but lacks clinching proof; Harrison (1968), 35 n.1; Scafuro (1997), 198-199. Gagarin also argues against the classification of killers as *kakourgoi* based on Aesch. 1.90-91, which similarly applies to *moichoi*; Gagarin (1979), 317-321. Scafuro accepts Harris' objections to the use of Aesch. 1-90-91, but argues that it does not contradict or disprove the hypothesis either; Scafuro (1997), 199 n.24. Conversely, Carey sees Harris' objections as having conclusively settled the matter against *moichoi* being *kakourgoi*; Carey (1995), 411. Kapparis agrees with Harris, citing Lys. 1.36 to demonstrate that *moichoi* were not subject to the same procedure as thieves; Kapparis (1999), 304-305.

Noting that the passage specifies the *moichos* is to be handed over in the lawcourt, Harris, who does not see a ban on killing a *moichos*, suggests that instead the restriction may have been designed to prevent pollution from bloodshed accruing to the lawcourt.<sup>602</sup> This does raise the question as to why the law did not allow the captor to take the *moichos* out of the lawcourt if he wished to kill him, especially if in any other circumstance he could do so. Pollution from killings in the Classical Athenian imagination also varied depending on the circumstances of the killing, with lawful killings accruing no pollution.<sup>603</sup> Harris cites Antiph. 5.11 to demonstrate the Athenian concern over pollution accrued from killing inside the lawcourt, albeit here the defendant is accused of homicide, and is regarded as potentially polluted from this unlawful killing.<sup>604</sup> If the law allowed for the killing of a *moichos* even outside of the circumstances allowed for by Kapparis, then this would be a lawful killing, and so the expectation would be that it would accrue no pollution.

As an alternative, Harris also suggests that the concern over using a knife may have related to castration, a practice noted by Herodotus as being the most unholy trade.<sup>605</sup> Mutilation is a common feature of the Middle Assyrian Laws. MAL A 15 allows the husband to cut off his wife's nose and castrate her lover, the husband of MAL A 4 is to cut off his wife's ears and the nose and ears of his slaves if he wishes to

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<sup>602</sup> Harris (2006), 289.

<sup>603</sup> See Dem. 9.44 and 20.158, where a lawful killing leaves the killer '*katharos*', free of any pollution.

<sup>604</sup> Harris (2006), 289 n.22.

<sup>605</sup> Harris (2006), 289; Hdt. 8.105-106.

recover the goods passed by his wife to his slaves, and at MAL A 24, the husband is to mutilate his wife and cut off the ears of the woman whose home she stayed at when she withdrew from her husband's house. Outside of Assyria, the adulterous Sumerian wife had an arrow bored through her nose, as does a Babylonian who brings a trial without good grounds.<sup>606</sup> The oath-breaking Egyptian adulterer of P DeM 27 was to have his nose and ears mutilated if he so much as spoke to the wife again.<sup>607</sup> A treaty from the Anatolian city of Alalakh records hands being cut off as a punishment for harbouring a runaway slave.<sup>608</sup> Whether castration specifically or mutilation more generally, this form of punishment would seem to best fit the restriction on using a knife. It is attested in neighbouring societies, it would not need to be a punishment specifically restricted only in the lawcourts, it would fit the revulsion expressed by Herodotus over castration, and it is a type of punishment that would specifically require a bladed instrument to carry it out, so would neither leave very similar punishments open via a different method, such as killing by torture, nor require a euphemistic understanding of the term as per Kapparis.

This still leaves the question open as to whether a *moichos* could be killed after a prosecution for *moicheia*, or only on the spot when caught in the act. Near Eastern legislation certainly allows for both

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<sup>606</sup> CT 45 18:14-16; Greengus (1969-1970), 33-44.

<sup>607</sup> Mutilation of the nose is also a punishment mandated by Horemheb for the unlawful seizure of boats; Lorton (1986), 57. Workers at Deir el-Medina were mutilated for stealing from private tombs; Lorton (1977), 40. The penalty for perjury in the *Legal Text of Mes* included cutting off the ears and nose; Lorton (1977), 37-38.

<sup>608</sup> Márquez Rowe (2003), 715.

circumstances, but just because Kapparis is likely incorrect in his reading of [Dem.] 59.66, does not necessarily mean he is incorrect about when a *moichos* could be killed. The lack of either examples of *moichoi* killed following a prosecution, or of any legislation allowing a capital punishment for *moicheia*, makes it difficult to know for sure, and it does not have to be the case that allowing execution in some circumstances means allowing it in all.<sup>609</sup> If a prosecution for *moicheia* did carry a capital sentence then it is likely that this would be found in the *graphe moicheias*, but as the details of this law do not survive then it is difficult to know whether it allowed for the death penalty. A *graphe* could carry a capital sentence if it was classed as an *agon timetos*, such as was the case with the *graphe hubreos*, but it did not have to.<sup>610</sup> As the lawful homicide law did allow for the killing, the restriction on using a knife of [Dem.] 59.66 likely was intended to prohibit mutilation or castration rather than killing, and a *graphe* could carry the death penalty, there is no good reason to assume that the right to kill enshrined in the lawful homicide law and found throughout the Near East would not have extended to prosecution for *moicheia*. Some scholars note that even if the law allowed for it, it was not the accepted

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<sup>609</sup> A comparison with Rome is again instructive. During the imperial period, killing an adulterer was allowed for in restricted circumstances, and the legislation only envisages the husband carrying out the killing on the spot; D. 48.5.25 pr.-1; Paul *Coll.* 4.12.5.

<sup>610</sup> As Cole believes the restriction on using a knife meant a ban on killing, she thinks it would be unlikely the law would allow a greater punishment here; Cole (1984), 104. Harrison states without evidence that the penalty under this law was death; Harrison (1968), 35. Harris acknowledges that there is very little evidence but suggests that what little there is points towards the death penalty being allowed under this law.



practice in fourth century Athens to execute a *moichos*.<sup>611</sup> As has been seen in the survey of Near Eastern evidence, it was also the case there that actual instances of executions for adultery are very rare, though there is no doubt that it was a legal right of the husband to execute the adulterer, whether on the spot or after a trial.

As fines were a common feature of the Athenian legal system then it would be a safe assumption that the *graphe moicheias* would have allowed for one to be imposed. The example of Epaenetus and Stephanos also demonstrates that they could be imposed via self-help when the *moichos* had been caught in the act, and a fragment of Cratinus records an enormous fine for *moicheia* of three talents paid by Callias.<sup>612</sup> In both of these cases, Athens was in line with the Near East. In Gortyn the situation was similar but with a local variation. Here, the captor must allow the relative of the *moichos* five days to a pay fine to secure his release.<sup>613</sup> Only if this period elapsed without payment could the captor inflict a physical punishment on the *moichos*.<sup>614</sup> No details are given as to what this punishment could entail, but the captor would

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<sup>611</sup> For example, see Cohen (1991), 129-132; Kapparis (1995), 110; Cantarella (2005), 244.

<sup>612</sup> Fr. 81 Kassel-Austin.

<sup>613</sup> G.72.2.31-37.

<sup>614</sup> Based mainly on fragments from Plato Comicus and Alciphron, Kapparis concludes that a payment extracted from a *moichos* was seen as a dishonourable option for the captor; Kapparis (1995), 111, and (1996), 64. Euphiletus does present Eratosthenes as attempting to buy his way out of his deserved punishment, albeit it suits Euphiletus to say this. There is no sense in any Near Eastern legislation that a fine was seen as immoral, as the wronged party always had the option to take a payment in lieu of another punishment. Given that the captor must take a payment if offered within five days, coupled with the payments demanded by Stephanos and by Hephaistos that offset the diminished values of Phano and Aphrodite respectively, and the prevalence of financial penalties in the Athenian legal system there is no reason to think that a payment was not an entirely acceptable way of settling a case of *moicheia* in Athens.

again appear here to be given *carte blanche*, and there is no restriction of any kind mentioned on what they could do.<sup>615</sup> If the *moichos* here wished to dispute the fine, then unlike in Athens where he could take the case to the lawcourts, the captor can swear an oath that he did take him in the act of *moicheia*.<sup>616</sup>

An unusual punishment faced by the *moichos* is mentioned in Aristophanes' *Clouds*, where, in the discussion between Just and Unjust, the former mentions the insertion of a radish into the anus, as well as the removal of bodily hair as punishments for the man who has been seized as a *moichos*.<sup>617</sup> There is also a fragment of Plato Comicus from the play *Phaon*, with an allusion to a similar punishment, but with a spiny fish rather than a radish.<sup>618</sup> This is a punishment which carries an obviously talionic element, as the *moichos* is penetrated in manner

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<sup>615</sup> Aelian records the punishment for *moicheia* in Gortyn as a fine of fifty staters, loss of citizen rights, and the *moichos* was forced to wear a garland made of wool; Ael. *VH* 12.12. The fine prescribed in the law code varied depending upon the location, with a fifty stater fine if the *moichos* was caught somewhere other than the home of the husband, father, or brother, and there is no mention of the other two punishments; G.72.2.20-30. Further, Aelian records these as punishments inflicted after a conviction by the magistrates, whilst the law code only considers self-help. It may be the case that the surviving section of the code contains a part of the law on *moicheia* which was focused on self-help, and a separate law which does not survive other than via Aelian dealt with prosecution for *moicheia*, but given how much later Aelian was writing, significant caution should be exercised in accepting this passage as an accurate account of *moicheia* law in the Classical period.

<sup>616</sup> G.72.2.38-45.

<sup>617</sup> Aristoph. *Clouds* 1083.

<sup>618</sup> Plato Comicus fr.189 *PCG*. See Thompson (1947), 245-246, who interprets these lines as a cruel punishment for *moicheia*, and followed by Roy (1991), 75. See also Carey (1995), 53-55. Kapparis notes this passage does not mention *moicheia*, and he argues against this view on the basis of his reconstruction of a law on *moicheia* which he attributes to Solon. He notes that the physical effects of this punishment could be quite severe due to the spines on the fish, possibly even resulting in death, and that Solon's law would only have allowed for humiliation. Conversely, he accepts that the radish was an actual punishment as it would only inflict humiliation; Kapparis (1996), 67-75.

which degrades and feminises him.<sup>619</sup> However, given the references are so few and are found only in comic plays, there is debate in modern scholarship over whether this was a punishment that was ever actually carried out, or was simply a humorous trope.<sup>620</sup> There are several references in Athenian sources, including lawcourt speeches, to *carte blanche* being given to the person to who catches a *moichos* in the act to treat him as he wishes, so in this respect the punishment would certainly be allowed for by the law, but none which specify this as a potential punishment.<sup>621</sup> Given that, caution should be exercised as accepting this practice in Classical Athens as anything other than the product of the comedic stage. In *Wealth*, Aristophanes again mentions depilation as a punishment for *moicheia*, though there is no mention of a radish there.<sup>622</sup> Whether the radish punishment ever occurred or not, its placement alongside depilation in *Clouds* suggests it was intended to humiliate the *moichos*, just similar punishments found in the Near East like LH 127, MAL A 18, and in the case of the Sumerian

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<sup>619</sup> See Devereux (1970), 20; Dover (1978), 106; Carey (1993), 53-55. All three scholars accept the practice as genuine, in part due to this element.

<sup>620</sup> The prevailing opinion in modern scholarship is that *moichoi* were subjected to *raphanidosia*. Dover accepts that this was an actual punishment, and that the depilation referred to pubic hair singed off with ashes; Dover (1968) 227; followed by Cantarella (1976), 151; MacDowell (1978a). Harrison glosses over the reference by stating the *moichos* could be subject to bodily humiliations; Harrison (1968), 33. Carey suggests the reason the practice is heard of only in comedy is because standards of propriety in the lawcourts would not allow it to be mentioned; Carey (1993), 53-55. Cantarella and Forsdyke see the punishment as an informal self-help practice rather than a legally granted right; Cantarella (2005), 244; Forsdyke (2012), 147. Lanni states that the practice was condoned by the Athenians; Lanni (2016), 39. Against this, Cohen and Roy both argue that none of the passages represent an actual occurrence, and they are in fact a comic trope about punishing *moichoi*; Cohen (1985), 385-387; Roy (1991), 73-76.

<sup>621</sup> Isaeus 8.44; Lys. 1.49; Xen. *Mem.* 2.1.5. See also [Dem.] 59.66, where the restriction placed on using a knife would not exclude this punishment.

<sup>622</sup> Aristoph. *Wealth* 168.

adulteress.<sup>623</sup> Given its existence as a punishment in the Near East, there is little reason to doubt that the removal of body hair would have been an actual punishment the Athenian *moichos* could be subjected to.

The punishments for the *moichos* caught in the act in Athens and Gortyn were thus broadly similar to those which could be imposed on the Near Eastern adulterer. Self-help punishments were available, and these could include death, humiliation, and a fine. It seems likely that in Athens there was a restriction placed upon punishments involving mutilation, and in Gortyn there was a restriction placed upon when a physical punishment could be applied. There is no evidence for what would happen in Gortyn if the captor wished instead to pursue a prosecution, but in Athens the *graphe moicheais* would have at least allowed a fine, and probably execution also. Mutilation would likely still not be allowed, and most unusually, this case could be brought by someone other than the wronged party given its status as a public action.

Whilst divorce was an option in the Near East, one surviving law states it to have been mandatory in Athens, and it possibly may also have been in Gortyn. The law at [Dem.] 59.87 is explicit in stating that the husband of a woman caught with a *moichos* must divorce her or be disenfranchised. This would be a significant departure from the discretion given the Near Eastern husband, and it has largely been assumed in modern scholarship to be an actual law in Classical

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<sup>623</sup> See Greengus (1969-1970), 33-44; Lafont, S. (1999), 37-41; Neumann (2004), 85-88.

Athens.<sup>624</sup> However, this law is a forgery which is not original to the text, and an examination of the wording of the law within the context of what precedes it clearly demonstrates that it has been poorly reconstructed from Apollodorus' speech. The law as Apollodorus describes it is one which prohibits any woman who has been caught with a *moichos* from attending public sacrifices. He states that the law allows any man who finds a woman taken by a *moichos* at a public sacrifice to do whatever they wish to her, as long as they stop short of killing her. This comprises the second part of the law found at 59.87.

Immediately preceding this, Apollodorus gives his account of how Theogenes came to divorce Phano, and it is from this that the forger mistakenly includes in the reconstruction of the law a requirement placed upon the husband to divorce his wife if she is found with a *moichos*. Divorce is never mentioned by Apollodorus in his discussion of the law, and nor would it be relevant to it. Further, Theogenes does not divorce Phano because he discovered her with a *moichos*, but to prove to the Areopagus that he did not know she was not Stephanos' daughter. A divorce requirement would also be unusual given that

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<sup>624</sup> Forsdyke regards the requirement to divorce as being 'clear and well known', reflecting the unquestioning acceptance of this law as genuine amongst modern scholarship; Forsdyke (2012), 155. For examples, see Harrison (1968), 35; MacDowell (1978a), 125; Cohen (1991), 110; Foxhall (1991), 302; Carey (1992), 129, and (1995), 414; Scafuro (1997), 202; and Gagarin and Perlman (2016), 349. A recent challenge to its authenticity has come from Canevaro, who notes that stichometric calculations show that the law could not have been part of the *Urexemplar*, and that it must either be a forgery or have been inserted by a conscientious editor who researched the original law. For many of the same reasons as discussed here, Canevaro sees it as more likely to be a forgery reconstructed from the text than the actual law; Canevaro (2013), 190-196. Lanni notes Canevaro's discussion of the law without engaging with it, and she considers divorce a likely requirement without further discussion or justification; Lanni (2016), 40.

*moicheia* encompassed more than just a marital relationship. Even if it was a requirement in this particular instance, the wording of the law in this speech does not reflect that, but rather assumes that the woman must be a wife.

Confirmation that this law is only a prohibition on entering public sacrifices with no mention of any requirement to divorce is found in two other lawcourt speeches. In *Against Timarchus*, Aeschines states that Solon drafted a law which prohibited a woman caught with a *moichos* from wearing fine clothing and jewellery, and from entering public sacrifices.<sup>625</sup> If she broke these prohibitions she could be stripped of her adornments, and she can be beaten as long as she is not maimed or killed. The correspondence with the law discussed by Apollodorus is sufficiently close that they must both be referencing the same one, but nowhere does either man mention anything about a requirement placed on the husband to divorce the wife.

Whilst this strongly suggests that the prohibition on entering public sacrifices was an Athenian law, it does not strictly rule out that the law also included additional elements not mentioned by either orator. Fortunately, Euphiletus helps to show that there was no requirement to divorce found in this or any other law. His defence is predicated on the

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<sup>625</sup> Aesch. 1.183. The mention of adornments in Aeschines, which is absent from [Dem.] 59.87, further underlines that the latter is a later reconstruction based on the preceding parts of the speech. Aeschines is attempting to demonstrate the morality of the Athenians when he gives this law, whereas Apollodorus is only concerned with it as it relates to Phano. As it is in the context of public sacrifices that he can introduce the law, he has no need to mention the part on adornments. Consequently, it is not present in the speech and thus cannot be included by the forger.

fact that he caught Eratosthenes in the act of sexual intercourse with his wife, and so the killing was lawful, so his entire speech is constructed to demonstrate that he complied with every requirement to ensure that the killing was lawful. Given his circumstances, it would be a remarkable omission if he divorced his wife and failed to mention that in his speech, especially as it would have strongly supported his account, yet nowhere does he do so.<sup>626</sup> In fact, Euphiletus casts the killing of Eratosthenes as a necessary act to guard his wife.<sup>627</sup> Euphiletus anticipates that his opponents will accuse him of entrapping Eratosthenes, and of killing him whilst he was at the hearth, and he addresses these arguments in his speech. Had he been required to divorce his wife and failed to do so, it would be an equally remarkable omission that he did not anticipate his opponents would use this fact against him, as even if he proved his defence, it would then leave him open to another severe punishment.

The one aspect that a forger could not have constructed from the text is the punishment of disenfranchisement for a husband who did not divorce his unfaithful wife. This could mean that the forger was aware that this was the penalty and so inserted it, but when balanced against the fact that neither Apollodorus nor Aeschines make any mention of this part of the law, no other source mentions it, and Euphiletus would

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<sup>626</sup> Although outside the comparative focus of this study, Roman law is instructive here as it did contain a provision requiring a husband to divorce an adulterous wife. In cases in which the husband had killed the adulterer, divorcing the wife immediately was a pre-requisite to any defence of lawful homicide; Macer D.28.5.25; Paul. *Coll.*4.3.5.

<sup>627</sup> Lys. 1.48.

almost certainly be in contravention of it, it is much more likely that this detail was added by the forger.<sup>628</sup> What the law on *moicheia* at [Dem.] 59.87 should be is simply the law as both Apollodorus and Aeschines present it. It is only concerned with a woman who has been caught with a *moichos*, and the sanctions she faces if she enters public sacrifices or adorns herself.<sup>629</sup> It makes no mention of husbands or wives, it makes no mention of a requirement to divorce, and nor is there absent any mention of sanctions on the *moichos*, as this law is not about the *moichos*.<sup>630</sup>

In the Gortyn Law Code, the section on *moicheia* is followed immediately by a section on divorce. The juxtaposition of these has led

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<sup>628</sup> Writing in the Roman Imperial period, Aelian records a similar loss of citizen rights as a punishment for *moicheia* in Gortyn, something which is not recorded in the *moicheia* laws which survive in the law code; Ael. VH 12.12. Carey sees the mention of loss of citizen rights as proof that the law must be genuine, as everything else can be reconstructed from the text; Carey (1992), 129. However, Canevaro points out both the issue with a law on *moicheia* phrased as if it were a law on adultery, and the silence of any other sources corroborating the law, and notes that there have been many cases of ingenuity on the part of a forger; Canevaro (2013), 195-196.

<sup>629</sup> The manner in which both Aeschines and Apollodorus present the reasoning for this law betrays a concern over the presence a woman caught with a *moichos* will have on the community. For Aeschines, wearing adornments or entering public sacrifices risks corrupting innocent women, whilst Apollodorus envisages the woman bringing a *miasma* which will negatively affect the sacrifices themselves. In this respect, she is much like the accused homicide, who cannot enter public spaces whilst awaiting trial due to the risk of pollution. As with the accused homicide, she becomes liable to a sanction when she enters them, but not if she stays away. Aesch. 1.187; [Dem.] 59.86.

<sup>630</sup> Much as with Cohen, Scafuro assumes that a portion of the law on *moicheia* has been recorded, instead of recognising it as a reconstruction from the text by a later forger. She places great emphasis on the use of the word *helein* by the forger to argue that the requirement to divorce came after the successful prosecution of the *moichos*, not after any self-help remedy was imposed by the husband. In support of her argument she cites the lack of any calls for disenfranchisement in the orators, even when aspersions of *moicheia* were being cast; Scafuro (1997), 202-205. As the requirement of this law to divorce is not genuine, then this both explains the absence of calls for disenfranchisement and renders moot any extrapolations from the wording used by the forger.



some scholars to conclude that divorce was expected in cases of *moicheia*.<sup>631</sup> This meets the immediate objection that the section on *moicheia* is not a section on adultery, so could only apply in one specific instance. Nor does either section make any mention of divorce in the context of *moicheia*. A further objection can be found in the emphasis of the arrangement of these two sections next to each other. Overall, the surviving part of the law code, whilst dealing primarily with family law in general, is somewhat haphazard in its arrangement. Laws on giving gifts, on slaves, and on liabilities, are spread throughout rather than grouped together in a coherent or comprehensive manner. Once the ‘evidence’ of the forger of the law of [Dem.] 59.87 is rightly dismissed, along with the overemphasis on the arrangement of the laws at Gortyn on *moicheia* and divorce, then a clear picture emerges in both Athens and Gortyn that whilst a husband could certainly divorce a wife who had been taken by a *moichos*, there was no legal compunction upon him to do so.

Whilst punishments for the *moichos* were largely the same as his Near Eastern counterpart, the same was not true for the woman. Death, mutilation, humiliation, and divorce with retention of dowry are all attested for an adulterous woman in the Near East. In Athens, however, the only sure punishment was the ban on attending sacrifices and adorning, with physical punishments only permitted if they transgressed this restriction, whilst in Gortyn there was no punishment

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<sup>631</sup> Lacey (1968), 215; Bile (2012), 44, 51.

at all. The lawful homicide law did not allow for the killing of the woman the man was found on top of, and the illegal restraint law of [Dem.] 59.66 makes no mention of a punishment which could be inflicted on the woman. Whilst this latter law was concerned with whether the man was a *moichos* and thus could be punished as such, if the case against him was proven then it meant both parties were guilty of *moicheia*, and by Near Eastern law both would be liable to the same punishment. There was no requirement on the Athenian husband to divorce his wife, and if he did there is no indication that he could keep part of the dowry. All that is left is the *graphe moicheias*, which may have allowed for a case to be brought against the woman, but given the preceding, coupled with the lack of any sense that Phano or the wife of Euphiletus had committed an offence that left them liable to prosecution, and that there was a specific law covering women who had been caught with a *moichos* and this law only placed certain restrictions on them, then it seems likely that these were the only legal consequences for an Athenian woman caught with a *moichos*. In Gortyn, the legislation on *moicheia* makes no mention at all of a punishment for the woman, only one for the *moichos*.

The evidence from Athens and Gortyn strongly suggests that in this respect, the Greek approach to *moicheia* in law had noticeable differences to the Near Eastern approach to adultery. Whilst both the Near Eastern adulterer and adulteress were each liable to broadly the same punishments, the punishment for the Greek *moichos* and the woman seized by him were not. Whilst the offence in the Near East

was one by the adulterous couple to the husband, the offence in Greece was simply by the *moichos* to the man under whose control the woman fell.<sup>632</sup> In Gortyn this was the extent of it, whilst the Athenians betray a similar communal concern as found in their approach to an accused homicide, by treating the offence as one which could be prosecuted by anyone, not just the offended party, and by excluding the woman from public sacrifices, and from adorning herself.<sup>633</sup>

Outside of Athens and Gortyn the evidence becomes much sparser. Euphiletus claims that *moicheia* is the only crime for which the same right of revenge is given all across Greece.<sup>634</sup> However, the evidence from Gortyn demonstrates that he would not have been able to kill Eratosthenes on the spot had the crime taken place in there. Plutarch claims there was no *moicheia* in Sparta, though even if this were not obvious hyperbole, the story Plutarch himself tells of Timaea's affair with Alkibiades would contradict it.<sup>635</sup> He also records that in Cumae, a woman taken in *moicheia* was displayed on a stone in the *agora*, and then marched around the circuit of the city mounted on a donkey. The ritual recalls similar public humiliations in Mesopotamia, albeit

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<sup>632</sup> Scafuro notes that there is only one extant use of the active form verb *moicheuo* to refer to a woman, and overwhelmingly it meant to commit *moicheia* with a woman, not *moicheia* committed by a woman; Scafuro (1997), 197. Equally, there is only one use of the noun *moicheutria*, a female *moichos*, and this is found in the unusual circumstance of Plato's *Symposium*, and the story told by Aristophanes in which he states that it is from the two halves of the androgynous person that the *moichos* and *moichuetria* are descended; Plato *Sym.* 191d-e.

<sup>633</sup> Euripides has Elektra claim that an unfaithful wife will be likely to continue to behave this way in future; Eur. *El.* 9.21-24.

<sup>634</sup> Lys. 1.2.

<sup>635</sup> Plut. *Lyc.* 15.9-10, *Alc.* 23.7-8.

without the extent of physical punishment those also entailed.<sup>636</sup> A fragment of Aristotle similarly records that the people of Lepreum bound those seized committing *moicheia* and led them around the city for three days, whilst women were made to stand in the *agora* for eleven days in a translucent tunic.<sup>637</sup> Writing much later, Aelian records a story that Zaleucus, the seventh century lawgiver of Epizephyrian Locri, passed a law requiring *moichoi* to be blinded as punishment, but after his own son was convicted of *moicheia*, he allowed himself to be blinded in one eye so his son would not be completely blind.<sup>638</sup> Assuming these are reliable accounts of punishments inflicted for *moicheia* in those *poleis*, it is difficult to know whether these were the only punishments available, or whether execution or a fine were also options.

### Oaths and Ordeals

There were circumstances in Classical Athens in which a person's statement about themselves would be considered true if he was prepared to support it with an oath. For example, those named for cavalry service could be exempted if they were prepared to swear under oath they either were not sufficiently fit to serve or that they lacked the

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<sup>636</sup> See Greengus (1969-1970), 33-44; Lafont, S. (1999), 37-41; Neumann (2004), 85-88.

<sup>637</sup> Aristot. *fr.* 611-642 (Ed. Rose). Forsdyke speculates based on a mention of a law by Demosthenes which allowed for certain offenders to be publicly displayed in stocks for five days, that something similar may have existed in Classical Athens for those taken in *moicheia*; Forsdyke (2012), 148-149. Whilst it cannot be ruled out, there is no evidence for it.

<sup>638</sup> Ael. *Var. Hist.* 13.24

means, and a witness could deny that a statement prepared by a litigant for them was true as long as it was done under oath.<sup>639</sup> However, these oaths were not for circumstances in which a person accused of an offence could swear to their innocence and be automatically regarded as such. Litigants did swear oaths before trials, and there also are around forty oath-challenges recorded in Athenian lawcourt speeches, in which one of the litigants recounts a challenge made to swear an oath by one or other of the parties in arbitration on a point of fact that would be proven should their opponent accept.<sup>640</sup> Of these, only two were accepted, and only one was actually carried out.<sup>641</sup> This single instance of an oath-challenge being accepted and carried out only came about via deception. The sons of a woman named Plangon claimed that a man named Mantias was their father. Mantias did not believe them to be his sons, and Plangon proposed that in return for a payment to her, he should challenge her to take an oath at arbitration to confirm that he was their father, and she would refuse, thus settling arbitration in his favour. Instead, Plangon did swear the oath, and Mantias was forced to accept paternity of her sons.<sup>642</sup>

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<sup>639</sup> *Ath. Pol.* 49.2; Aesch. 1.147. See Dem. 19.124-129, and Aesch. 2.94-95, for an account of the latter's withdrawal from an embassy to Philip on the grounds of ill health, which Demosthenes claims was made under oath, and see also Rhodes (2007), 14-15.

<sup>640</sup> For example, see Dem. 29.26, 31.9, 50.31, 54.39; Lys. 32.13. The majority of these challenges were made by the person who would swear the oath if the challenge was accepted, though some were made to challenge the opponent to swear the oath. See also Gagarin (2007), 39-41.

<sup>641</sup> See Dem. 33.13-14 for the oath-challenge accepted by Apaturius, but which was not carried out. Dem. 39.3-4 and 40.8-11 for the account of Mantias' agreement with Plangon that she should refuse an oath as to the paternity of her children, which she then went through with.

<sup>642</sup> It is noteworthy that the speaker here, Mantitheus, presents the oath as being decisive either way, whether it was sworn or not. A similar situation is suggested

The incident suggests that an oath-challenge could decisively settle a case at arbitration without need to send it to the courts, as long as both parties agreed to it and the terms of the oath covered the facts of the case. Consequently, Mirhady argues that the reason lawcourt speeches almost always mention oath-challenges which were not accepted is not because they rarely were, as the preponderance of the evidence would suggest, but because if they were there was no need to take the case to trial, and thus no need for a litigant to mention it.<sup>643</sup> Against this, Gagarin sees the Plangon oath as arising from a unique set of circumstances, and without this deception, a situation would not normally occur in which both parties would agree to an oath that could settle the case.<sup>644</sup> Gagarin separates oaths in Classical Athens into two types, ‘religious’ and ‘rhetorical’, and sees the latter as not technically being an oath, but rather an offer of an oath which by convention allows a litigant to call upon their opponent’s refusal to accept the oath as support of their own case.<sup>645</sup> Gagarin is likely correct that litigants did not put themselves into a position where a case could be decided at

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in [Dem.] 52.15, wherein Apollodorus disputes an oath-challenge was made to his father in arbitration and was refused. The implication being that if this had happened then the refusal could have decided the case. However, other oath-challenges made to the opponent do not appear to be decisive. In the example of the oath-challenge that was accepted but not carried out, this was on some of the charges that were brought by Parmeno against Apaturius. Although Apaturius did not go through with the oath and may have forfeited a deposit for not doing so, he was not automatically considered guilty of those charges. Instead, he issued a countersuit, and the two men agreed to arbitration instead, although this was not carried out either; Dem. 33.13-18. In the case of [Dem.] 59.59, Phrastor refused an oath-challenge at arbitration, but no information is given as to whether this alone decided the case. See also Dem. 29.52, where a refused oath-challenge has no bearing on the case.

<sup>643</sup> Mirhady (1991), 78-83.

<sup>644</sup> Gagarin (2007), 40-47.

<sup>645</sup> Gagarin (2007), 46.

arbitration by an oath, and that Mantias would not normally have done it, though it is clear from Plangon's oath that they did have legal force should a litigant accept.<sup>646</sup> Whilst this would mean a woman accused of *moicheia* in Athens could potentially be regarded as innocent if an agreement was made for her to swear an oath at arbitration to that effect, there was nothing in Athenian law that would grant her the automatic right to do it if she was accused but had not been caught in the act.

That the nature of Athenian litigation did not allow for the same procedure as found in the Near East did not, however, leave an Athenian wife more vulnerable than her Near Eastern counterpart. The reason for this lies in the punishments that were available to the husband, as the wide-ranging powers given to the Near Eastern husband were not given to the Athenian husband, and of particular note is the lack of any evidence suggesting that the Athenian husband could

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<sup>646</sup> Gagarin sees 'rhetorical' oaths as ones which were not taken as seriously by the Athenians as 'religious' oaths, as the challenges were made with no expectation they would be accepted, nor were there any consequences for refusal. However, and as Gagarin notes, that both litigants swore 'religious' oaths before a trial did not mean the loser of the trial was considered to be a perjurer. Consequently, and given he makes the seriousness with which oaths were regarded a differentiating factor, he suggests that not even litigants oaths were taken seriously; Gagarin (2007), 46. The case of the Egyptian man twice caught for adultery and twice swearing oaths in court not to do it again suggests that the seriousness with which an oath was taken is misplaced as a differentiating factor, and that what differentiates these oaths is not whether one is 'religious' and taken seriously, whilst the other is 'rhetorical' and not taken seriously, but whether the oath is accepted. The oaths taken by the Egyptian were accepted by all parties involved. That he had violated his oath the first time did not impact on the second oath. Likewise, Mantias and Plangon had agreed to abide by the oath, and there is nothing to suggest that an oath of any sort would not be taken seriously in an Athenian trial if both parties accepted it. Gagarin does see that whether the oath was accepted was important but conflates this with an integral value judgement on the oath itself.

retain some or all of the dowry if he divorced his wife for *moicheia*. As has been seen, there is evidence for the Sumerian, Hittite, and Demotic Egyptian husband's right to retain at least part of the dowry if they divorced their wife for adultery, and the likelihood is that this right was also found in neighbouring civilisations. The obligation to return the dowry was a powerful disincentive for a Near Eastern husband to exercise his right to divorce his wife, as to do so could place a severe financial burden on him. It meant a Near Eastern husband had an incentive to cite adultery if he wished to divorce his wife, as well as an incentive to fabricate a charge of adultery. The oath swearing procedure consequently afforded the Near Eastern wife some legal protection in this regard.

As noted above, a dowry was not necessary to conclude a marriage in Classical Athens, but it was usually given, and here too the obligation to return it if a husband wished to divorce his wife was a powerful financial incentive against doing so.<sup>647</sup> No evidence survives which demonstrates whether an Athenian husband could retain some of the dowry if he divorced his wife for a proven case of *moicheia*, nor that he had to return of all of it either. Phrastor did retain the dowry he received from Stephanos when he divorced Phano, but it is clear from the speech that he did so illegally, and that he only succeeded because

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<sup>647</sup> For example, see Isaeus 3.28, where the speaker argues that Nicodemus would not have married his sister to Pyrrhus without at least a fictitious dowry, as without one it would be very easy for Pyrrhus to divorce her. See Isaeus 2.9 for an example of a returned dowry due to divorce. If the husband failed to return the dowry then not only was he liable to a suit for its recovery, but also for an annual interest payment on top of it; [Dem.] 59.52.



he could threaten Stephanos with a suit for passing Phano off as an Athenian citizen, should Stephanos try and pursue a claim for the dowry. For Harrison, if the law did not allow retention of the dowry in even these circumstances, then it must also have been returnable in cases of *moicheia* too given the severity of Stephanos' offence, though even if this goes too far, that not a single Classical Athenian source suggests that there were any circumstances in which part of the dowry could be retained due to divorce with fault on the wife's part, means it is unlikely that it could be in cases of *moicheia*.<sup>648</sup>

Foxhall has argued that the reason actual cases of *moicheia* are so rare in the Athenian sources is that husbands would not have wanted to risk ridicule by bringing the affair to public attention.<sup>649</sup> She regards it as noteworthy that in the one sure example of *moicheia* that there is, Euphiletus is forced to choose between conviction as a homicide, or

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<sup>648</sup> Harrison (1968), 55-56. See also Just (1989), 73; Sealey (1990), 29. Whilst it may in fact be the case that Phano was a citizen and was actually the daughter of Stephanos, and that Apollodorus is manipulating the circumstances of their divorce, it must be the case that Athenian law did not allow for retention of the dowry in these circumstances, else Apollodorus' account would make no sense. Harrison suggests that this circumstance is worthier of retention of dowry than *moicheia*, as here the *kurios* has acted fraudulently, whereas in cases of *moicheia* he would be innocent. This would rely on an understanding of the dowry as being the property of the *kurios*, and not as belonging to the wife. Foxhall argues that the dowry was effectively the possession of the wife, though she too sees no circumstance under which the dowry could be legally retained in the event of divorce; Foxhall (1989), 34-37. Foxhall does suggest that, in reality, it may have been difficult to recover the dowry if the wife had been divorced for *moicheia*; Foxhall (1989), 42 n.104. Cole assumes that the dowry would have had to be returned in cases of *moicheia*; Cole (1984), 106. Schaps sees the law as being less important than what a speaker can argue in court, though this view places much too much weight on the discretion of the *dikastai*; Schaps (1979), 83. The lack of any mention of the dowry in the forgery of [Dem.] 59.87 is unhelpful in this regard given that the section on mandatory divorce is not a part of the actual law.

<sup>649</sup> Foxhall (1991), 303.

being publicly revealed as a cuckold. So only when the alternative is worse would a husband have been prepared to bring a case of *moicheia* into the courts. However, with free, no fault divorce available to a husband, then if he suspected his wife of *moicheia* and wished to be rid of her, he could do so without any recourse to the courts. This means that even if Foxhall is correct, and Classical Athenian husbands may have preferred to keep *moicheia* out of the courts because of the social stigma it could bring, there was in fact no incentive at all for a Classical Athenian husband to bring a case of *moicheia* to the courts. He could divorce his wife without needing to prove it, and proving it brought no material benefit.

This means that it would be far simpler and more straightforward for a husband who suspected his wife of *moicheia* just to divorce her. For the wife's part, as her husband was required to return the dowry then she did not find herself in the vulnerable position of her Near Eastern counterpart. She could not have her dowry retained, she was not liable to a capital sentence, to a physical punishment, or even a fine. The only consequence for her was her ability to attend public sacrifices and how she dressed. If her husband suspected her of committing *moicheia*, whether he had proof or not, all he could do was divorce her, unless he also wished to impose the punishment of Aesch. 1.183 and [Dem.] 59.85-86.

Whilst in Mesopotamia, a third-party could make an accusation of adultery against a wife without proof, forcing her to undergo an ordeal, in Classical Athens, third-party accusations of *moicheia*, regardless of

the degree of proof, would need to be brought to the courts via the *graphe moicheias*, rendering the need for any sort of oath or ordeal procedure moot. Much as with the husband, there would be very little to gain from doing this as any fine would be paid to the *polis*, the only sure punishment was the ban on attending public sacrifices and adorning, and there was the risk of the third-party having to pay a fine himself and losing the right to bring any further prosecutions of this type if he failed to receive at least one-fifth of the votes.

That a husband whose wife committed *moicheia* could not retain any of the dowry also speaks against it being a requirement of Classical Athenian law that an adulterous wife must be divorced. Foxhall notes the onerous burden it could place on a husband to be forced to divorce his wife, though for her the requirement is proof that the maintaining of traditional gender stereotypes was more important than any individual burden the requirement placed on a husband. If that were the case, then it would be a simple thing to also legislate an allowance to retain part of the dowry. Not only is this found in the Near East and in Rome, but in a later Greek context too, Achilles Tatius presents an account of an accusation of *moicheia* made by an Ephesian husband in the Hellenistic period, in which he may keep all of the dowry if he proves his case.<sup>650</sup>

Unlike in Athens, there were circumstances in Gortyn in which a litigant could swear an oath as to their version of events being correct

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<sup>650</sup> Achilles Tatius 8.8.13.

and win their case. For example, a section of the law code covers claims by creditors on a deceased person's estate, and it appears here as if a plaintiff can swear an accusatory oath in order to win his claim.<sup>651</sup> In further contrast to Athens, cases of divorce in Gortyn do feature an element of fault. Here, if the husband is responsible for the divorce, then not only must he return the dowry, but must also pay the wife five staters.<sup>652</sup> Conversely, there is no corresponding penalty placed upon the wife if she is at fault. If the husband accuses her of taking property belonging to him then she must return it along with a fine of five staters, but there is no fine to be paid if she is considered at fault. Further, if she is accused of taking her husband's property then she can swear an oath to Artemis denying that the property is his.<sup>653</sup> Swearing the oath means the property is then automatically regarded as being hers, and if it is taken from her it is to be returned along with a payment of five staters. The protections afforded the Gortynian wife go beyond even those provided to the Athenian wife. She must have her dowry returned, she is protected against any attempt to retain it, and she is not liable for any penalty if she is at fault, even in cases of *moicheia*. Whilst the oath-swearing procedure differs from the Near Eastern one in that

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<sup>651</sup> G.72.9.24-40.

<sup>652</sup> G.2.45-3.1. Whether 'dowry' is an accurate term for the property a wife brings to a marriage in Gortyn is a matter of dispute. In line with his views on ownership in Gortyn, Gagarin sees this as simply the wife's property, and not a dowry, and part of the wife's inheritance. Conversely, Maffi argues that the woman never owns this inheritance, and that it functions much like an Athenian dowry. See Gagarin (2008b), 5-25; Gagarin (2012a), 57-67; Gagarin (2012b), 73-92; Maffi (2012), 91-111. For the purpose of this discussion, what is ultimately important is less whether the wife owned the property or not, but that she was entitled to take all of it if the marriage came to an end.

<sup>653</sup> G.72.3.1-16. A fuller account of the oath swearing procedure for this is found at G.72.11.46-55.

she does not affirm her innocence, it instead protects her should her husband wish to divorce her, and ultimately achieves a similar end. Much as in Athens, the lack of punishments available for the Gortynian husband to impose on his unfaithful wife also means there was little incentive for him to make an accusation without proof.

Whereas Athens and Gortyn demonstrate a regional variation in their approach to oaths used to decide cases, with the Athenian court system leaving no place for them outside of an agreement between the litigants that was likely to have been rarely used, their similar approaches to the return of the wife's dowry or property in the event of a divorce, coupled with the lack of any punishment the husband could subject his wife to in cases of *moicheia*, meant there was no need for any specific provision for the wife to undergo an ordeal of any kind if she was faced with a groundless accusation of *moicheia*. The evidence from Achilles Tatius, albeit later than the Classical period, gives pause in extrapolating a common Greek approach to dowries in cases of *moicheia*, but does point towards the broader Greek conception of *moicheia* as again accounting for a regional difference amongst the Greeks. The relative lack of punishment faced by the adulterous Greek wife because it was subsumed in the broader offence of *moicheia* made it less necessary to legislate for this occurrence. In instances where a woman who was not a wife was suspected of *moicheia* there was even less incentive for her *kurios* to make an accusation or bring a prosecution. Plutarch's dubious account of Solon's law on selling a daughter into slavery aside, there was no material benefit to be gained,

and if the *kurios* was likely to have to arrange a marriage for the woman it would even be counter-productive to make an accusation of *moicheia*.

Gortyn did have a different oath procedure in cases of *moicheia* that impacted the *moichos* rather than the woman. If he was caught in the act, but claimed that he was entrapped, the captor could swear an oath that he did take the man in the act of *moicheia*.<sup>654</sup> Presumably, if the captor does swear then the man is considered to be a *moichos*, whereas if he does not then he must release him.<sup>655</sup> This stands in contrast with Epānetus, who was able to bring a suit against Stephanos, and then settle the dispute in arbitration.

#### Equal Punishment

The principle of equal punishment was a central feature of Near Eastern adultery law. The offence of the adulterer to the husband was effectively measured by the extent to which the husband punished his wife, with collusion also a secondary concern. As has been discussed, punishments for a woman taken by a *moichos* were minimal in Athens and focused mainly on mitigating a perceived moral threat that her presence and attire could pose, whilst they were entirely absent in Gortyn. Consequently, there is nowhere found any requirement for equal punishment in either *polis*. That collusion could be a concern is demonstrated by Stephanos, Neaira, and Phano, and even if

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<sup>654</sup> G.72.2.36-45.

<sup>655</sup> Gagarin (2010), 130.

Apollodorus' account is exaggerated, or even outright fabricated, it at least demonstrates an awareness of the issue that collusion could cause. In the absence of punishment for the woman, entrapment was consequently much easier to carry out. In this respect, it is noteworthy that the Athenians had a law designed to mitigate against this. The fate of Eratosthenes demonstrates it was of little use if the *moichos* was slain on the spot but given that it was likely to have been the case that this was very rarely the punishment a *moichos* was subjected to, then the procedure employed by Epaenetus afforded an accused *moichos* some protection against entrapment. This would not have been necessary in Near Eastern adultery law due to the requirement of equal punishment.

The absence of equal punishment coupled with the general lack of punishment faced by the woman underlines a fundamental difference between adultery in the Near East and *moicheia* in Greece, which likely stems from the broader conception of *moicheia* as an offence committed by a man who has sexual intercourse with any woman under the control of another man. Whilst adultery could easily be cast as a betrayal by the wife to her husband, it is much more difficult to conceive of sexual intercourse by a sister, daughter, or mother in the same way. This meant that *moicheia* was understood by the Greeks as an attack by the *moichos* on the head of the household, but not as an offence against him by the seduced woman. As *moicheia* subsumed adultery within it, then this extended to acts that elsewhere would be considered as the separate offence of adultery. The Greek wife was then

not subject to the same liabilities for committing adultery as the Near Eastern wife. She could not be physically punished, nor financially penalised by divorce with retention of dowry. Whilst she certainly could be divorced, this was a right granted to the husband regardless of whether the wife was at fault. As she was not conceived of as having committed an offence to her husband, then the punishment her lover was liable to was not linked to her own punishment, and Euphiletus could even cast the killing of a *moichos* he had caught with his wife as an act which protected both her and his household. Greek women certainly could be imagined as the active party in any sexual liaison, such as Helen in *Trojan Women*, or the many women whom Xenophon claims pursued Alkibiades; but even allowing for this, and even if adultery, was the primary way in which *moicheia* was considered a concern in Greece, this broad definition of the offence allowed for a completely different approach to punishing a wife than that found amongst their neighbours in the Near East.<sup>656</sup>

## Conclusion

The topic of *moicheia* has been the source of much debate in modern scholarship. As the focus has usually been inward looking, then the points of debate have tended to be equally so. When the focus has been to compare *moicheia* to adultery in neighbouring societies, it has been to note the seeming difference between the two with respect to the

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<sup>656</sup> Eur. *Tro.* 1049-1059; Xen. *Mem.* 1.2.24.



relationships which were covered by the respective offences. The noteworthy exception is Cohen, for a whom a comparative study was the starting point not for an examination of the differences, but for his argument that *moicheia* was in fact the same as adultery. Beyond this simple observation, the discussion has tended to focus inwardly on exactly what *moicheia* was, what its unifying feature was, whether it was simply adultery, or effectively adultery, how the laws on it evolved, and how *moichoi* were punished. For the Athenian woman taken by a *moichos*, the law given at [Dem.] 59.87 has usually been taken at face value, with the assumption that divorce was the mandated punishment, even if the punishment made little sense in the light of the broad conception of *moicheia*, and left open the question as to what happened to the daughter, sister, or mother taken by a *moichos*.

Due to this inward focus, some important differences between *moicheia* in Greece and adultery in the Near East have been overlooked. Whereas adultery was seen as a most serious offence committed by both the adulterer and the wife against the husband, *moicheia* was seen as an offence committed by the *moichos* against the man under whose control the seduced woman fell. For the *moichos*, the offence was no less severe than that committed by the Near Eastern adulterer. Both offences were a capital one, even if in practice this may have only been applied in rare circumstances such as that of Euphiletus and Eratosthenes. A financial penalty was almost certainly available to the Near Eastern husband, whilst the account of Stephanos and Epänetus demonstrates that it certainly was in Classical Athens, and

fixed penalty amounts were imposed in Gortyn, with a physical punishment only allowed for if the fine was not paid. Humiliation, at least in the form of depilation, and possibly in more painful ways, was also found in both. The comparison with the Near Eastern evidence helps to shed light on the restriction found in [Dem.] 59.66, where the *moichos* can be punished as his captor sees fit, but cannot have a knife used against him, which points to a difference in approach. Mutilation was a fairly common punishment in Near Eastern law codes, and examples of it can be found in the context of adultery. There is no sense it was allowed in Classical Athens, and the otherwise *carte blanche* that this law afforded the person who captured a *moichos* was likely intended not to prevent him from killing the *moichos*, but to prevent him from mutilating him.

The situation for the wife was very different, however. Unlike her Near Eastern counterpart, she could not be killed, mutilated, or humiliated, and whilst she could be divorced, she could not have any of her dowry retained. The laws at Gortyn did not impose any penalty upon the wife should she be at fault for a divorce, even though they did impose a penalty for the husband if he was at fault. Despite the broad acceptance of its veracity amongst modern scholarship, the mandatory divorce law of [Dem.] 59.87 is a forgery. The only accurate reflection of a Classical Athenian law it offers is in the restriction placed upon a woman's ability to attend a public sacrifice if she had been taken by a *moichos*. It is this restriction on what she can wear and where she can go which was the only legal punishment an Athenian woman faced, and it reflects

not an attempt to punish her directly for her offence, but to prevent that offence was from negatively affecting the community. As the woman in Classical Athens and in Gortyn faced little risk from a baseless accusation of *moicheia*, there was no need to afford her the same protections a Near Eastern wife was given from a baseless accusation of adultery. In the absence of evidence, a Near Eastern wife could undertake an ordeal, or swear an oath as to her innocence and be legally regarded as such. For the Athenian and Gortynian woman, there was simply no need.

So stark was the difference between the liability of unfaithful wife in Greece and the Near East, that it enabled Euphiletus to claim his execution of Eratosthenes was a necessary act to protect his wife from a *moichos*. Had she been a Near Eastern wife, then her offence would have been the same as Eratosthenes'. She would have committed the same serious offence, and she would have been subjected to the same capital punishment. The culpability of the wife was of such importance, that the offence to the Near Eastern husband was measured by the extent to which he punished his wife. If he did not punish her at all, then she could have committed no offence against him. By extension, this meant that the adulterer could have himself committed no offence against the husband, and consequently he could not be punished. This was not the case in Athens or Gortyn, and that it was not speaks to a fundamental difference between the offences of adultery and *moicheia*. It is not simply the case that *moicheia* was a broader offence than adultery. It is better understood as a different offence than adultery.

One which is similar to it, and by its nature subsumes it, but is not it. Adultery was an attack on the rights of the husband by his wife and her lover. It attacked his right of exclusive sexual access, cast doubt on the paternity of his children, and it was betrayal of him by his wife of the utmost magnitude. *Moicheia* resists any attempt to find one single unifying element, but by casting it as an attack by the *moichos* upon the man under whose power the woman fell, whether *kurieia* or not, and not as an offence by the woman herself, then it was an attack on the household, and on the control exerted by a *kurios* over his household. It threatened the paternity of any children in the household, it impacted the value of the woman as a current or potential wife, but it did not directly impact the right of exclusive sexual access by the *kurios*, and it was not a betrayal on the part of the woman.

Exactly why the Greek *poleis* did not follow their neighbours in separating out adultery from the seduction of an unmarried woman in their laws is not clear, but that they did not meant that they could not legislate separately for offences which were specifically adultery. It meant that they did not impose punishments that could only affect a wife, such as compulsory divorce or retention of dowry, they did not see the wife as being legally culpable, and they did not measure the extent to which the *moichos* had committed an offence by the extent to which the woman was punished. With the exception of mandatory divorce, which would have intruded upon the husband's right to punish as he saw fit, these were all elements of Near Eastern adultery law. The secondary concern of collusion, which was adequately dealt with by

the requirement of equal punishment in Near Eastern law, could not be covered by *moicheia* law, and instead required specific provisions such as the false imprisonment law in Athens, and the oath-swearing procedure in Gortyn, neither of which carried any risk for the woman.

The comparison made here between Near Eastern adultery laws and Greek *moicheia* laws serves to demonstrate the extent to which *moicheia* was a different offence than adultery. It shows that rather than understanding *moicheia* by understanding it as adultery, and then moving out from there to peripheral offences affecting different relationships, it should be approached from the other direction, and understood as an offence in its own right. One which by its nature covered offences that would have been dealt with in the Near East by adultery legislation, but in Greece had to be dealt with by *moicheia* legislation, and which meant that Greek law did not punish the adulterous wife in the same way as her Near Eastern neighbour.

## Conclusion

The overarching purpose of the two case studies presented in this thesis has been to demonstrate the value of considering the Greeks and their legal history in the context of the wider region that they were a part of. Whilst each society deserves consideration on its own merits, the eastern neighbours of the Greeks are often studied as part of a homogenous whole, with the Greeks regarded as being apart, different, and worthy of study in isolation. Whilst great strides forward in considering the Greeks as part of a network of exchange have been made in other areas, much less work has been done in the field of legal history. In part, this is due to the practicalities of the subject matter, as influence cannot easily be detected simply by identifying similarities in the manner that it can be in fields such as art and literature. It is also the case that differences in legal approach between the Greeks and the

societies of the Near East have helped in maintaining a barrier, with the rule of law and autocratic rule seen as a demarcation point. Even if the distinction is sometimes blurrier than is imagined, there is no doubt that the Greeks of the Archaic and Classical period did develop political systems that were not based on autocratic rule, and their legal systems reflected that. However, the day-to-day regulating of relationships between members of the community presented largely the same issues whether a given person lived under autocratic rule or not.

The case study on homicide pollution helps to demonstrate a continuity between the Greeks and their eastern neighbours as the Athenians regarded homicide as a private wrong, just as it was in the Near East. In contrast to modern homicide procedure, it was an offence that from a legal standpoint was left up to the relatives of the victim to prosecute. Whilst for the Athenians, a communal concern also intruded upon the process which included a bar on accepting compensatory payments, on an accused killer entering certain public spaces, and on the threat of pollution to help motivate the removal of a killer from the community, this case study helps to demonstrate that this concern was not uniquely Greek. Even though the context is different, and consequently the expression can vary, the Hebrew Bible displays the same communal concern, which meant that it too placed a bar on accepting compensatory payments, and it too used the threat of pollution to motivate the removal of a killer from the community.

The identification of this communal concern undermines a de-emphasising of the place of homicide pollution beliefs in Classical

Athens found in some scholarship, and by studying the Greeks in this broader context, homicide pollution is instead revealed as the point at which a traditionally private legal offence began to become a wider societal concern. Homicide pollution reflects the community's desire for the next of kin to take action to remove a killer from its midst. It does not motivate the next of kin to take action because the legal structure of the community is too weak to do so itself, but because the traditional legal structure does not otherwise allow the community to intervene.

In the case of *moicheia*, a genuine difference between Greek legal practice and that of the Near East is found. Even here, though, studying *moicheia* in the context of Near Eastern adultery law helps to illuminate the fact that the two are not the same offence. The comparison demonstrates that *moicheia* covers what would be dealt with as two separate offences in the Near East; adultery and the seduction of an unmarried woman. As assumptions are usually made that *moicheia* is primarily adultery with a somewhat wider application, to the extent that *moicheia* is sometimes even translated as 'adultery', then the law of [Dem.] 59.87 is often accepted uncritically. As adulterous wives are punished, then it is only natural that they are punished in Athens also. But these women have not committed adultery, and the lack of any requirement of equal punishment, a fundamental part of Near Eastern adultery law, helps to underline that the offence is not theirs, but belongs only to the *moichos*, and only the *moichos* is liable to punishment. It also means that a woman taken by a *moichos* does not



need the same protection from a baseless accusation of adultery that is granted to a Near Eastern wife.

Further insights are also gained from the comparison. The relative lack of examples of a *moichos* being executed for the crime is also found in the Near East with regards to adultery. As there are many laws which state the Near Eastern adulterer could be liable for the death penalty, then equally there is no reason to assume that killing a *moichos* was not permissible under Athenian law. Mutilation was a punishment found in the Near East for a variety of offences, including adultery, which may shed light onto the reference to a ban on using a knife on a *moichos* found at [Dem.] 59.66. It was not a ban on killing the *moichos*, but the comparison suggests it was a ban on mutilating him.

Whilst the stated goal of this thesis was to regard the Greeks as just one society within a wider region, it has been the case that by using the Near Eastern evidence as a point of comparison for the Greek that it has risked falling into the trap of replacing one way of privileging the Greeks with another. One in which the Greek participation in a wider Near Eastern network is acknowledged, but then the Near Eastern evidence is treated as a homogenous whole and used only to draw conclusions about the Greeks. This has not been the intention of these case studies, but it is rather a function of their aim to demonstrate the usefulness of studying Greek legal history in a wider context. Even though the focus of these case studies has been on advancing the understanding of Greek legal history, the observation that the Hebrew Bible helps to demonstrate that homicide pollution in Classical Athens

represents a communal concern in a specific set of circumstances is one which could equally be made in the other direction, whilst the example of Euphiletos helps to demonstrate that the lack of recorded instances of execution for adultery in the Near East does not mean that it did not happen. These two case studies should not prove to be the only two areas in which the understanding of both Greek and Near Eastern legal history can be enhanced by considering this wider context, and further study in other areas should hold the promise of further insights.

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